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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 270

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL., APPELLANTS,

vs.

LAKELAND HIGHLANDS CANNING CO., INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

FILED AUGUST 7, 1939.

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[fol. 1]

IN UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION

#89. Civil T.

LAKELAND HIGHLANDS CANNING CO., INC., a Corporation; The Polk Company, a Corporation; Roberts Brothers, Inc., a Corporation; Florida Grapefruit Canning Co., a Corporation; D. J. Apte and R. W. Apte, doing Business as Apte Brothers Canning Co.; Floridagold Citrus Corporation, a Corporation; Bordo Products Company, a Corporation; Hills Brothers Co. of Florida, a Corporation; Bruce's Juices, Inc., a Corporation; Eckerson Fruit Canners, Inc., a Corporation; Sundine Company, a Corporation; Plaintiffs,

v.

NATHAN MAYO, as Commissioner of Agriculture of the State of Florida, Defendant

COMPLAINT—Filed March 23, 1939

Come now the Plaintiffs and would show unto the Court:

I

(a) That the Lakeland Highlands Canning Co., Inc., is a corporation organized and existing under the laws of the State of Florida, duly authorized and qualified to do business in the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of [fol. 2] citrus products produced and grown in said State; that the principal place of business of said plaintiff is Highlands City, in Polk County, Florida;

(b) That The Polk Company is a corporation organized and existing under the laws of the State of Indiana, duly authorized and qualified to do business in the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Polk County, Florida;

(c) That Roberts Brothers, Inc., is a corporation organized and existing under the laws of the State of Maryland, duly authorized and qualified to do business in the State

of Florida, and engaged extensively, as more particularly hereinafter set out, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff for canning citrus products is in Polk County, Florida;

(d) That Florida Grapefruit Canning Co., is a corporation organized and existing under the laws of the State of Florida, duly authorized and qualified to do business in the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Manatee County, Florida;

(e) That Apte Brothers Canning Co. is a co-partnership composed of D. J. Apte and R. W. Apte, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Hillsborough County, Florida;

(f) That Floridagold Citrus Corporation is a corporation organized and existing under the laws of the State of Florida, and engaged extensively, as more particularly [fol. 3] set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is in Polk County, Florida;

(g) That Bordo Products Company is a corporation organized and existing under the laws of the State of Illinois, duly authorized and qualified to do business in the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is in Polk County, Florida;

(h) That Hills Brothers Co. of Florida is a corporation organized and existing under the laws of the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Tampa, Hillsborough County, Florida;

(i) That Bruce's Juices, Inc., is a corporation organized and existing under the laws of the State of Florida, and engaged extensively, as more particularly set out herein-

after, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Tampa, Hillsborough County, Florida;

(j) That Eckerson Fruit Canners, Inc., is a corporation organized and existing under the laws of the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Sanford, in Seminole County, Florida;

(k) That Sundine Company is a Delaware corporation authorized to do business in the State of Florida, and engaged in the citrus canning business in this District.

[fol. 4]

II

That the Defendant, Nathan Mayo, is Commissioner of Agriculture of the State of Florida, and maintains his principal office in the County of Leon, State of Florida, with representatives within the jurisdiction of this court for the purpose of enforcing the act attacked hereinafter, in this complaint.

III

This cause involves a controversy in excess of $3,000.00, exclusive of interest and costs, and arises under the Constitution of the United States of America.

IV

That during the past decade the canning of grapefruit and grapefruit juice with other citrus has developed into one of the principal industries of the State of Florida. The principal products canned are grapefruit hearts or sections and grapefruit juice, other citrus juices, orange juice and combination juices or grapefruit and orange, and some citrus salad; the grapefruit and grapefruit juice constituting the large majority of the citrus canning industry. During the past seven years the volume of the products canned is as follows:

(Converted into No. 24/2 cans)

	Grapefruit	Grapefruit Juice	Combination Juices
1931-1932	895,962 Cases	235,034 Cases	Cases
1932-1933	2,138,285	722,721	
1933-1934	2,145,499	605,817	
1934-1935	3,539,456	2,175,695	
1935-1936	2,149,610	1,608,287	80,800
1936-1937	3,971,624	3,709,751	265,684
1937-1938	3,419,226	3,370,002	574,329

During this period of time there was also canned approximately 1,500,000 cases of orange juice and 200,000 cases of citrus salad and 500,000 cases of combination juices.

[fol. 5] This industry constitutes an important and valuable outlet for grapefruit in the State of Florida. During the last five years the amount of grapefruit thus utilized was 24,334,804 boxes.

During said five-year period the percentage of grapefruit grown in Florida that has been used in the canning production has steadily increased, as shown by the following table:

	1933-34	1934-35	1935-36	1936-37	1937-38
Percent of production used by the Canners	21.78%	36.51%	32.01%	37.14%	41.44%

Of this total pack plaintiffs herein for the past three years packed the following aggregate amounts and average annual amounts in cases:

Canned Grapefruit Products

Plaintiff	3-year total pack	Annual average pack
Lakeland Highlands Canning Co	980,081	326,693
The Polk Company	2,587,000	862,333
Roberts Brothers, Inc	355,415	118,471
Florida Grapefruit Canning Co	765,241	255,080
Apte Brothers Canning Co	.....	.....
Floridagold Citrus Corp	1,816,427	605,475
Bordo Products Company	1,434,849	478,283
Hills Bros. Co. of Fla	1,209,038	403,012
Bruce's Juices, Inc	618,298	206,099
Eckerson Fruit Canners, Inc	.....	.....
Sundine Company	80,000 (1935-36 season only)	80,000

[fol. 6] Plaintiffs herein have thus packed over the 3-year period far in excess of 60% of the total pack of the canned grapefruit and grapefruit juice in the State of Florida.

Estimated pack for the present season 1938-1939 was that the pack would be far in excess of the pack for any prior season in the history of the State of Florida; however, because of the facts and circumstances hereinafter alleged the pack to date is approximately 2,000,000 cases less up to the time of filing this complaint than was packed during the same period of the season of 1936-1937, which was the largest season up until the present season; even though up to the effective date of the Regulation of the Citrus Commission, to-wit: January 19, 1939, these plaintiffs and all other canners had canned an unusually large volume of products.

IV-A

Plaintiffs would show unto the Court that each of them, since January 10, 1939, has been offered large volumes of grapefruit from many of the growers of the State of Florida at prices ranging from 12 for fruit to be canned into grapefruit juice, to 20¢ to 25¢ per field box for fruit to be canned into sections or hearts; and that each of said plaintiffs, except for the provisions of the said Regulation and said Act, could and would have purchased said grapefruit and canned the same and sold the canned product to the different distributors at a profit far in excess of $3,000.00.

IV-B

Many growers own their own canning plants and have been canning their grapefruit without the burden of the law hereinafter referred to; that many growers have been [fol. 7] canning their grapefruit through cooperative organizations to which the defendant contends the price law does not apply.

That by reason of the foregoing facts canned grapefruit is now being offered for sale at prices which do not net the grower 32¢ per box on the tree.

These plaintiffs allege that because of the foregoing facts the said Growers' Cost Guarantee Law, hereinafter referred to, and the Regulation thereunder, are discriminatory in that it attempts to force these plaintiffs to pay a minimum price for their raw products while permitting others to operate in competition to these plaintiffs unrestrained by the provisions of said Law and Regulation; and unless the relief herein prayed for is granted these plaintiffs will have their property taken without due process of law, and will suffer irreparable damages to each far in excess of $3,000.00.

V

Canned grapefruit and grapefruit juice packed in the State of Florida are widely distributed in interstate commerce and in excess of 99% of all canned grapefruit products canned by the plaintiffs named herein are canned solely for and go into interstate commerce; such products being sold in almost every state in the United States, and in foreign countries.

[fol. 8] Of the canned products of the plaintiffs herein the percentage of their grapefruit and grapefruit juice pack sold in interstate commerce is as follows:

Plaintiff	Sold in interstate commerce	Sold in Florida
Lakeland Highlands Canning Co. Inc.	99½%	½%
The Polk Company	100%	None
Roberts Brothers, Inc.	99%	1%
Florida Grapefruit Canning Co	99½%	½%
Apte Brothers Canning Co	99 3/4%	¼%
Floridagold Citrus Corporation	99.92%	.08%
Bordo Products Company	100%	none
Hills Brothers Co. of Florida	97%	3%
Bruce's Juices, Inc.	99 14/15%	1/15 of 1%
Eckerson Fruit Canners, Inc.	98%	2%
Sundine Company	99.90%	1/10%

The amount of such canned citrus products consumed in the State of Florida is negligible.

During the 1936-1937 season, that is, beginning November 1st, 1936, up to and including October 15, 1937, there [fol. 9] were exported 847,884 cases of canned grapefruit, of which 843,800 cases were shipped to the United Kingdom, and the remaining number of cases were shipped to France, Belgium, Holland, Germany, India, Egypt and South America, and during the same period of time there were exported to the same countries an aggregate of *of* 34,427 cases of grapefruit juice.

VI

The packing season for the canning of citrus products grown in the State of Florida begins about the first of November of each year and reaches volume production in about two weeks, and the canning continues until June or July of the following year. Preparations for canning necessitates the ordering of cans, labels, making contracts for the purchase of fruit, securing labor, the planning of factory operations in general. In addition it is the commercial practice, and frequently financing of the pack requires the packer to secure sales orders for the finished product in advance of or at the opening of the packing season.

VII

During the past six years the canning of citrus products in other areas has largely increased and is now in serious competition with the citrus packed in the State of Florida. During the 1937-1938 season there was produced in the

State of Texas 102,483 cases of grapefruit sections or hearts and 4,344,540 cases of grapefruit juice, and it is estimated that the crop of grapefruit in Texas this season will be approximately 15,000,000 boxes, which is by far the largest crop in the history of the industry in Texas.

[fol. 10] The territory of Puerto Rico has produced approximately 200,000 cases of grapefruit sections each year for the past few years. In addition, production of canned grapefruit in states other than Florida has amounted to approximately 100,000 cases.

The crops in the states other than in the State of Florida, as well as in this State, have continued to grow over a period of years and the canned citrus products produced in states other than the State of Florida actively compete in interstate commerce with the canned citrus products produced in Florida. In addition, canned grapefruit juice competes with other fruit juices, such as tomato juice and pineapple juice, and any impediment upon the ready purchasing of grapefruit juice will cause a shift in consumption to other juices and diminish the volume of production and shipment in interstate commerce from the State of Florida.

Within the last few days canned grapefruit juice produced and canned in the State of Texas has been offered for sale at a price of from 42¢ to 45¢ per doz. f.o.b. Texas in large volumes, and unless the injunction herein prayed for is granted these plaintiffs will be unable to compete with such competition. Plaintiffs are informed and believe and so allege the facts to be that the different companies canning in the State of Texas are now buying grapefruit at a price of 12¢ to 20¢ per field box delivered to the canning plant, which is less than one-half of the minimum price fixed by the regulation.

That over a period of years Florida canned grapefruit has enjoyed such a place in the markets that it could demand a slightly higher price than that canned in Texas and [fol. 11] other places but unless the relief herein prayed for is granted so these plaintiffs will not have to face a "pegged" price, they will be unable to can grapefruit to compete with that canned in Texas and other places, and the canning industry of Florida will suffer an irreparable loss and each of these plaintiffs will thereby suffer damages in excess of $3000.00.

VIII

The plaintiffs and each of them have invested in the State of Florida, in canning factories, receiving stations, and other necessary equipment far in excess of $100,000.00, and that the total of such investments by all of the plaintiffs exceed the sum of $2,000,000.00;

That annually during the citrus packing season in Florida plaintiffs operate their several canning plants and factories, and employ daily in and about the processing, canning, labelling and packing of grapefruit sections and juice approximately 5000 persons, and the weekly pay-roll of the plaintiffs throughout the canning period for the citrus season amounts to approximately $100,000.00 each, and every week of their operation.

IX

That there was grown in the State of Florida during the present season approximately 21,000,000 boxes of grapefruit, which is the largest production in the history of the citrus industry in the State of Florida; that because of the enactment of the statute hereinafter referred to and the regulation promulgated thereunder by the Florida Citrus Commission it has been impossible for these plaintiffs to operate their factories and pay the grower the sum of 32¢ [fol. 12] per field box and that there are approximately 2,000,000 cases less canned in the State of Florida at this time than there were at the corresponding date in the season 1936-1937, which was the heaviest pack up until this season, and that the grapefruit which would have been put in said cans, had the plaintiffs been permitted to operate without the interference of the Act hereinafter set forth, is practically all decayed and rotting because the growers, who did not own a canning plant or belong to a cooperative were unable to sell their fruit.

Many growers in the State of Florida are ready, willing and anxious to dispose of their fruit to the plaintiffs or some of them at whatever price market conditions will warrant, but plaintiffs are unable to purchase said fruit because of the Act hereinafter referred to, and said fruit will be permitted to drop from the trees and to rot and decay in the groves.

X

Plaintiffs only operate their canning plants during the season for packing and canning which is a period of approximately seven months as hereinbefore alleged; that in order to be prepared to operate their plants during said season it is necessary that the plaintiffs keep on an annual pay-roll many employees during the period of time when they are not in operation and that when the plants are not in operation the plaintiffs suffer large expenses and costs in overhead expenses, salaries, administrative expenses, factory personnel, electricity or other power for operating their plants, and taxes. Plaintiffs allege that if this Court [fol. 13] does not grant the injunction herein prayed for they will be unable to operate the remaining portion of this season and the loss to each and every of said plaintiffs will far exceed the sum of $3,000.00 in overhead costs, salaries, etc., as above set forth.

Plaintiffs say that each of them suffer losses in excess of $400.00 per week in pay-roll expenses alone while they are shut down and if the relief prayed for herein is not granted they will be forced to keep their plants closed for the remainder of the season and each thereby suffer loss in excess of $4500.00 for that item of expense alone.

XI

Plaintiffs in their several businesses depend to a large extent on certain distribution channels and that because of the inability of the plaintiffs to operate their plants this season due to the Act and the Regulation hereinafter referred to, the Plaintiffs have been and will be unable to take care of the requirements of their different distributors and dealers throughout the United States and foreign countries; that these distributors and dealers have over a period of years built up good will for the different brands canned and labelled by the plaintiffs and have used merchandising efforts such as advertising and display to increase the consumption of the canned products of these plaintiffs, and to further the good will of said products.

Plaintiffs allege that unless the relief herein prayed for is granted, the plaintiffs will be unable to can their grapefruit and grapefruit juice in accordance with the requirements of their trade and that they and each of them will

[fol. 14] suffer irreparable loss and damage to their trade, good will and trade marks, far in excess of $3,000.00 to each of said plaintiffs; that if over a period of time these plaintiffs are ever able to re-gain the good will for their products that they now enjoy, it would only be at a tremendous cost and expense to these plaintiffs and each of them.

These plaintiffs further allege that grapefruit and grapefruit juice are in competition with many other canned products such as tomato juice and pineapple juice, and that to meet said competition it is necessary that the products be continuously before the public, and that the retail price of same be kept on a competitive base with other products; that if this Court does not grant the relief herein prayed for canned grapefruit and grapefruit juice canned by these plaintiffs will be supplanted by other products because of the inability of these plaintiffs to can grapefruit and grapefruit juice.

If these plaintiffs were able to pay 32¢ per field box to the growers as required by the Act hereinafter referred to, and the Regulation promulgated thereunder, it would be necessary for these plaintiffs to receive for the canned products between 62¢ and 70¢ per doz. for grapefruit juice, and that there is now being quoted in the State of Texas grapefruit juice at 42¢ per doz.; that should these plaintiffs attempt to comply with the Act hereinafter referred to and the Regulation thereunder by paying 32¢ to the grower per field box, they would each suffer a tremendous loss in meeting competition of the Texas juice as quoted above.

[fol. 15] XII

These plaintiffs have been warned by the Commissioner of Agriculture that if they attempt to operate their plants and not pay the grower 32¢ per field box their licenses will be revoked, but these plaintiffs allege that there are several thousand cases of grapefruit and grapefruit juice in the State of Florida at this time which have been canned and are now being canned upon a cooperative basis and there is now being offered on the markets canned grapefruit canned in the State of Florida by some of the cooperative associations at a price of 80¢ per doz., and these plaintiffs allege that when the necessary costs of canning and sales thereof are deducted from the returns on a basis of 80¢ per doz., there is not a sufficient amount left to pay the grower the

sum of 32¢ per field box, and that if the Act hereinafter set forth and the Regulation thereunder are held valid and enforcible then these plaintiffs will be unable to compete with the fruit and fruit juices that are being canned by the cooperative organizations and the large investments of these plaintiffs will be lost, resulting in irreparable damage to each of the plaintiffs in a sum far in excess of $3,000.00.

XIII

That the Legislature of the State of Florida of 1935 enacted Chapter 16862, which is hereinafter referred to as the Growers' Cost Guarantee Act, copy of said Statute being hereto attached, marked Exhibit "A", and by reference made a part of this Complaint.

[fol. 16]

XIV

That the Legislature of the State of Florida of 1937 enacted Chapter 17777 Laws of Florida, hereinafter referred to as the Bond and License Law, a copy of said Act being hereto attached, marked Exhibit "B", and by this reference made a part of this Complaint.

XV

Each of the plaintiffs herein is a canner of citrus fruits and holds a license issued by the Commissioner of Agriculture under the Bond and License Law, and has filed a good and sufficient bond in accordance with such law.

XVI

That under the provisions of the Growers' Cost Guarantee Act during the present season the defendant, Nathan Mayo, as Commissioner of Agriculture, by and with the consent and advice of the Governor of the State of Florida has declared the existence of a state of emergency in the citrus industry, on or about the 13th day of January, 1939.

That the Florida Citrus Commission, on or about the 16th day of January, 1939, passed a certain Resolution, copy of which is hereto attached, marked Exhibit "C", and by this reference made a part of this Complaint.

The said Resolution states that there has been presented to the Florida Citrus Commission petitions signed by persons, firms, corporations and associations, which the Com-

mission finds own or control 50% or more of the producing acreage of citrus fruit and 50% or more of the producing acreage of grapefruit in the State of Florida, requesting the [fol. 17] Commission to determine the average reasonable cost per standard packed box of producing grapefruit, but these plaintiffs allege that the Citrus Commission did not have filed before it at the time of the passage of said Resolution petitions signed by persons, firms or corporations owning 50% or more of the producing acreage of citrus fruit in the State of Florida.

XVII

The said Growers' Cost Guarantee Act provides that the basis for ascertaining whether the petitions were signed by persons, firms or corporations owning or controlling 50% or more of the producing acreage of citrus fruit was to be the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further survey as the Citrus Commission may from time to time make.

Plaintiffs allege that the determination of the percentage was not based upon any survey made by the Federal Emergency Relief Administration, nor was it supplemented by any survey made by the Florida Citrus Commission, and that therefore the Florida Citrus Commission had no right, authority, power or jurisdiction to issue the Regulation, copy of which is attached hereto as Exhibit "C".

XVIII

The said Growers' Cost Guarantee Act likewise provides that before determining the reasonable cost per standard packed box the Citrus Commission should have from the producers, shippers and handlers of citrus fruit, not subject to the provisions of the Act, binding agreements to conform thereto and abide by its terms. Plaintiffs allege [fol. 18] that at and before the passage of the Resolution, a copy of which is attached hereto as Exhibit "C", the Citrus Commission had procured no agreements whatsoever from producers, shippers or handlers of fruit, not subject to the provisions of the Act, and therefore the Florida Citrus Commission had no power, authority or jurisdiction to issue the said Regulation, copy of which is hereto attached as Exhibit "C".

XIX

Plaintiffs further allege that the 32¢ price for grapefruit determined by the Florida Citrus Commission in its Resolution dated January 16, 1939, copy of which is attached hereto as Exhibit "C", is arbitrary, capricious, unreasonable, unfair, inequitable and confiscatory and constitutes a denial of property rights of these plaintiffs without due process of law; that said price was not properly determined by the Florida Citrus Commission, as required by the Growers' Cost Guarantee Act, but was adopted as the result of experiments on certain isolated groves by certain persons who were not members of the Florida Citrus Commission, and that the said price is not the actual cost of production nor an average reasonable cost per standard packed box of grapefruit throughout the State of Florida;

That among other things, the said 32¢ basis includes 9.8¢, considered by the Commission to represent interest on investment by the grower.

[fol. 19]

XX

Plaintiffs further allege that Eckerson Fruit Canners, Inc., one of the plaintiffs herein, heretofore obtained a temporary injunction from the Circuit Court of Seminole County, Florida, in a suit wherein the Commissioner of Agriculture claimed that the said plaintiff was violating the Growers' Cost Guarantee Act by operating its factory under a certain contract with the growers, whereby the said plaintiff was canning grapefruit for the account of the growers and charging the growers for the cost of canning; that the said cause was appealed to the Supreme Court of Florida, which Court on March 17, 1939, rendered its opinion holding that said contract did violate the provisions of the said Growers' Cost Guarantee Law, but in said cause the said Supreme Court of Florida did not consider the constitutional validity of the Growers' Cost Guarantee Law.

That for a period of approximately fourteen days these plaintiffs, or a majority of them, have been attempting to operate their plants under contracts somewhat similar to the said contract of the plaintiff, Eckerson Fruit Canners, Inc., but that since the decision above referred to, rendered by the Supreme Court of Florida, the defendant, Commissioner of Agriculture, has threatened to revoke the license of each and every of these plaintiffs if they continue to

operate under such contracts and these plaintiffs believe and so allege that the said Commissioner will revoke their licenses unless enjoined by this Honorable Court.

XX-A

Plaintiffs say that in excess of 99% of their finished canned products have gone and do go directly into inter-
[fol. 20] state commerce and are shipped to the several States of the United States as well as to foreign countries, and that the enforcement of the Act will violate Article I, Section 8 (3) of the Constitution of the United States, as it imposes a burden on and directly interferes with interstate commerce.

If said law and the Regulation thereunder are held valid then these plaintiffs will be unable to operate their plants, and can grapefruit and grapefruit juice, and the flow of their canned grapefruit and grapefruit juice by these plaintiffs into interstate commerce will be completely stopped.

The effect of said Act will be to attempt to fix the sale prices of grapefruit and grapefruit juice canned in the State of Florida wherever the sales may be made in the United States or in foreign countries, although grapefruit and grapefruit juice canned in the State of Florida under the provisions of said Act and the Regulation thereunder must compete in the open market with grapefruit and grapefruit juice canned in other states.

XXI

The Growers' Cost Guarantee Act is unreasonable, arbitrary and vague.

The said Act is so vague and indefinite that the true intent and purpose of the Act cannot be ascertained therefrom:

(a) the said Act provides that "petitions must be signed by persons, firms, corporations, owning or *controlling* 50% or more of the producing acreage of citrus fruit" but the word "control" is not defined in any manner in said Act, [fol. 21] and because of the many applications of said word and the varying definitions thereof the Act is vague and indefinite as to the intention of the Legislature as to whom should sign said petitions.

(b) The Act further provides that "the Citrus Commission shall have procured from the producers, shippers, or

handlers of citrus fruit, *not subject to the provisions* of this Act, binding agreements to conform thereto and abide by its terms" before the Citrus Commission shall determine the cost to the grower.

The Statute does not define which producers, shippers or handlers of citrus fruit are subject or not subject to the provisions of the Act.

Handlers of citrus fruit, who transact their business outside the State of Florida are certainly not subject to the provisions of said Act, and could not even be known to the Citrus Commission, and it would be impossible for the Citrus Commission to procure agreements from all the handlers of citrus fruit; therefore, the provisions of the said Act could not be put into force and effect by the said Florida Citrus Commission.

XXII

The Act is further vague, indefinite, uncertain and contrary in that it provides that every contract, agreement, plan or arrangement "* * * shall be held to require that the person, firm, corporation or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production" but provides no penalties whatsoever for violation of said quoted provision, [fol. 22] nor provides any means or method of enforcing the same whatsoever.

The Act likewise provides that "any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production * * * shall" be unlawful and against public policy to that extent but further provides "but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding", so that the entire Act is so vague, indefinite and uncertain that it is impossible to tell who or what transactions are subject to the provisions thereof.

XXIII

The defendant contends that under the Bond and License Act, copy of which is attached hereto as Exhibit "B", he has the power to and will revoke the licenses of these plaintiffs, and each of them if they do not pay 32¢ to the grower for each field box of grapefruit received by them for canning purposes.

These plaintiffs allege that the defendant, Commissioner of Agriculture, is without authority whatsoever to revoke the licenses of these plaintiffs or either of them for their failure to comply with the provisions of the Growers' Cost Guarantee Act or the Regulation promulgated thereunder, but that unless restrained by this Honorable Court the said Commissioner will illegally and improperly and without any authority whatsoever, revoke the licenses of these plaintiffs and each of them, and that thereupon the plaintiffs will be forced to stop their businesses or be subject to the heavy fine and imprisonment under Section 13 of the Bond and License Act.

[fol. 23]

XXIV

That unless restrained by this Court, defendant will revoke the license of each of these plaintiffs and will thereby deprive these plaintiffs, and each of them, of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

That if the licenses of these plaintiffs are revoked their right to transact their lawful business in the State of Florida will be taken from them, and their property will be further taken in the loss and irreparable damage caused by the revocation of their said licenses.

XXV

Plaintiff, Florida Grapefruit Canning Company further shows unto the Court that prior to the promulgation of the Regulation by the Citrus Commission, copy of which is attached hereto as Exhibit "C", it had entered into binding contracts with growers of grapefruit in the State of Florida, whereby the growers of grapefruit agreed to furnish to said plaintiff approximately 60,000 field boxes of grapefruit at a price less than 32 cents per field box; that said plaintiff likewise had contracts of sale whereby plaintiff agreed to sell canned grapefruit and grapefruit juice at a price that would have netted to said plaintiff a profit in excess of $3,000.00 over and above the cost of said fruit under the contracts above referred to, and all additional costs in connection with the processing, canning and shipping thereof.

This plaintiff alleges that by the promulgation of said Regulation it has been unable to accept said 60,000 boxes

of grapefruit at the price set forth in said contract, and that it is unable to pay 32¢ a box for grapefruit and process the same, and sell it to the consumer under his contract to said consumer; therefore the said Statute and the promulgation of said Regulation thereunder, have impaired the [fol. 24] obligation of his contracts in violation of Article I, Section 10 of the Constitution of the United States.

Wherefore, the premises being considered, the plaintiffs pray:

First. That this Court take jurisdiction of this cause and of the parties hereto.

Second. That process of this Court be issued to the Defendant, Nathan Mayo, as Commissioner of Agriculture of the State of Florida, under the rules of this Court, requiring the said Defendant to answer this Complaint.

Third. That this Court do grant to the Plaintiffs a temporary restraining order against the said Nathan Mayo, as Commissioner of Agriculture, his successor or successors, assistants, deputies, agent or agents, attorneys, servants, inspectors, employees or other representatives from suspending, revoking or cancelling the licenses of the plaintiffs and each of them, as citrus fruit dealers, and from enforcing or attempting to enforce in any manner or form whatsoever the said Regulation of the said Florida Citrus Commission, dated January 16, 1939, and Chapter 16862 Laws of Florida, 1935, being the Growers' Cost Guarantee Act, or in any manner molesting or interfering with the plaintiffs in the operation of their several canning plants and factories because of their failure to comply with the Regulation of the said Citrus Commission and said Chapter 16862 Laws of Florida, 1935.

Fourth. That after issuance of said temporary restraining order this Court do convene a Three-Judge Court, and after notice of hearing that said Three-Judge Court enter a temporary injunction to the same effect as said restrain- [fol. 25] ing order.

Fifth. That upon final hearing the said Three-Judge Court enter a final order and decree making said injunction permanent.

And for such other and further relief as to the Court shall seem meet.

Knight, Thompson & Sutton, by G. L. Reeves, Attorneys for All Plaintiffs. G. L. Reeves, Of Counsel, Tampa, Florida.

[fol. 26] *Duly sworn to by J. Adams Bruce. Jurat omitted in printing.*

[fol. 27] EXHIBIT "A" TO COMPLAINT

Growers' Cost Guarantee Law

Chapter No. 16862

Laws of Florida—Acts of 1935

An Act relating to citrus fruit: Prescribing conditions and limitations upon the sale, marketing and processing agreements.

Whereas, it is found by the Legislature and hereby declared that the production and distribution of citrus fruit is a paramount industry in Florida upon which the prosperity of the State in a large measure depends; that such fruit and the juices thereof have become and are generally used in great and rapidly increasing quantities, both voluntarily and upon advice of physicians, by people of all classes, ages and conditions; that it is necessary for the reasonable comfort, welfare, and health of the people and in order to build up their strength and vigor that an adequate and dependable supply of high grade citrus fruit be constantly available, and the production, transportation, processing, distribution and sale of citrus fruit in the State of Florida is therefore hereby declared to be a business affecting the public health and interest, that unfair, unjust, destructive, demoralizing, and uneconomic trade practices have been and are continuing to be carried on in the sale and distribution of citrus fruit in this state to the extent that such fruit has been and is continuing to sell in many cases at prices below the cost of production and the constant, dependable and adequate supply of such fruit for sale and consumption is thereby so seriously imperiled as to threaten the break down of the industry; that the present acute economic condition in Florida is in part the con-

sequence of a severe and increasing disparity between the prices of citrus fruit and other commodities; that it is both [fol. 28] expedient and necessary to build up the quality and reputation of Florida's citrus fruit in the market and to stabilize the Florida citrus industry and to protect the public and the growers against fraud, deception, and financial loss through further continuation of unscrupulous practices and haphazard methods in connection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

Therefore, in the exercise of the police power of the State for the purpose of protecting and promoting the public health and general welfare,

Be It Enacted by the Legislature of the State of Florida:

Section 1. This Act shall be known and called the Growers Cost Guarantee Act.

Section 2. The term "Citrus Fruit" as used herein means and includes only the fruits Citrus Grandis, Osbeck, commonly called grapefruit, and Citrus Sinensis, Osbeck, commonly called oranges, and Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

The term "standard packed box" means 1⅗ bushels whether in bulk or in a container.

Section 3. The Commissioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitions signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time [fol. 29] to time may make, and after the Citrus Commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the average reasonable cost per standard packed box of producing

citrus fruit and every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production, to be ascertained by multiplying the said cost per standard packed box as shown by the record of the Commission current at the time the contract, agreement, plan of arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

Section 4. The provisions of this Act shall apply to any one or more of the citrus varieties embraced hereunder as may be determined by the petitions and agreements provided for in the foregoing section.

Section 5. This Act shall become effective immediately upon becoming a law.

Approved June 8, 1935.
Filed in Office Secretary of State June 8, 1935.

[fol. 30] EXHIBIT "B" TO COMPLAINT

Bond and License Act

Chapter No. 16860, Laws of Florida—Acts of 1935
As Amended by Chapter No. 17777, Acts of 1937

An Act Relating to the purchase, handling, sale and accounting of citrus fruit grown in the State of Florida; to prevent fraud and deception therein; to provide for the licensing and bonding of citrus fruit dealers; to prescribe certain powers and duties of the Commissioner of Agri-

culture of the State of Florida in the administration and enforcement of this act; and to prescribe penalties for the violations of the provisions of this Act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That as used in this Act:

(a) The term "person" means and includes individuals, firms, partnership, association, corporation, and any other business unit.

(b) The term "citrus fruit" means and includes only the fruit Citrus Grandis, Osbeck, commonly called grapefruit, and/or Citrus Sinensis, Osbeck, commonly called Oranges, and/or Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

(c) The term producer means and includes any person engaged in the business of growing and/or producing citrus fruit.

(d) The term "consignor" means and includes any person other than a producer who ships or delivers to any commission merchant, or dealer any citrus fruit for handling, sale or resale.

(e) The term "commission merchant" means and includes any person engaged in the business of receiving any citrus fruit for sale, on commission or for or on behalf of another.

(f) The term "consignment shipper" means and includes any person who contracts with the producer of citrus fruit for the marketing thereof for the sole account and risk of [fol. 31] such producer and who agrees to pay such a producer the net proceeds derived from such sale.

(g) The term "cash buyer" means and includes any person who purchases any citrus fruit in Florida from the producer thereof for the purpose of resale.

(h) The term "broker" means and includes any person engaged in the business of negotiating the sale or purchase of any citrus fruit.

(i) The term "agent" means and includes any person, who on behalf of any one citrus fruit dealer, negotiates the consignment or purchase of any citrus fruit.

(j) The term "dealer" means and includes every person other than a producer, consignor, commission merchant, consignment shipper, cash buyer, broker, or agent who in any manner makes or attempts to make money or any other thing of value on any citrus fruit by dealing in the same in any manner whatsoever.

(k) The term "citrus fruit dealer" means and includes every consignor, commission merchant, consignment shipper, cash buyer, broker, agent association, cooperative association, and dealer, as hereinabove defined.

(l) The term "Commissioner" means the Commissioner of Agriculture of the State of Florida.

(m) The term "standard packed box" means one and three-fifths (1⅗) bushels of citrus fruit whether in bulk or in container.

(n) *The term "shipping season" means and includes that period of time commencing July 1 of one year and ending June 30 of the following year.*

Note: The italic portion did not appear in the 1935 Act.

Section 2. That no person shall act as a citrus fruit dealer without having obtained a license as provided in this Act. That any person desiring to engage in the business of citrus fruit dealer in the State of Florida shall make application to the Commissioner for a license. The Commissioner may by regulation prescribe the information to be contained in [fol. 32] such application. Upon the filing of the application, and annually thereafter, the applicant shall pay to the Commissioner a fee of Ten Dollars except that where any applicant expects to deal only as an agent, as defined herein, such applicant shall pay the sum of Five Dollars. All such license fees collected hereunder shall be paid by the Commissioner into the State Treasury monthly to the Credit of the General Inspection Fund. Said fees shall be kept in said General Inspection Fund and are hereby appropriated and made available for defraying the expenses incurred in the administration and enforcement of this Act.

Note: The following paragraph appeared at the end of Section 2 in the 1935 Act.

"In cases where a sale of citrus fruit is made direct to a purchaser for cash paid at the time of sale, no license shall

be required but any agent of the Commissioner shall, if the citrus fruit has been properly inspected, graded and labeled as required by law, issue a certificate to the purchaser reciting that the fruit has been inspected and all requirements of law complied with and that the fruit has been paid for and such certificate shall be accepted in lieu of a license by all agents and employees of the Commissioner. No fee shall be charged for such Certificate."

Section 3. That before any license is granted by the Commission to any person other than an agent as defined in this Act, the applicant therefor must deliver to the Commissioner a good and sufficient cash bond or surety bond executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety, in the amount of Ten Dollars for each one thousand standard packed boxes of citrus fruit that the said applicant intends to deal with during the next twelve months, as set forth in his application up to and including one million standard packed boxes of citrus fruit; provided, however, that no bond shall be less than Five Hundred Dollars in amount nor greater than Ten Thousand Dollars in amount. Said bond shall be in the form approved by the Commissioner and shall be conditioned upon compliance with the provisions of this Act, and upon faithful compliance with the conditions of all contracts, verbal or written, made by [fol. 33] the citrus fruit dealer with producers relative to the purchase, handling, sale and accounting of sales of citrus fruit and upon applicant accounting for the proceeds of any citrus fruit contracted for in accordance with the terms of the contracts with producers. Said bond shall be to the Commissioner and his successors in office, in favor of every producer with whom applicant deals in the purchase, handling, sale and accounting of sales of citrus fruit. The aggregate accumulated liability under any such bond shall not exceed the amount named therein. Every such bond shall continue in force and effect until ninety days after the termination of the shipping season for which the bond is given. Any producer claiming to be injured or damaged by any act of said citrus fruit dealer, or the Commissioner on behalf of all producers contracting with the said citrus fruit dealer, *amy* maintain an action on said bond against the citrus fruit dealer and the surety named in said bond, or either of them, and any judgment against the citrus fruit

dealer, and/or surety in any such action shall include costs.

In cases where liability under and by virtue of any bond given pursuant to the provisions hereof is admitted, without suit, and the amount or amounts admitted to be due are paid to the Commissioner, the Commissioner is authorized and directed to ascertain the amount or amounts due the claimant or claimants who has or have duly filed a claim or claims under and in connection with such bond prior to the expiration of ninety days immediately following the end of the shipping season for which such bond was given, and thereafter the Commissioner shall make distribution of the amount or amounts so paid to him under such bond to the extent that the same may reach in satisfying such claim or claims; provided, however, that where there are two or more claimants who have duly filed claims within the time last aforesaid that aggregate an amount in excess of the amount or amounts held by the Commissioner for distribution, such claimants shall participate in the proceeds of such funds in [fol. 34] the hands of the Commissioner only on a pro rata basis, and no one of such claimants shall receive any preference over the others by reason of having filed his claim prior to the filing of the claims of the others.

Note: In the 1935 Act, Section 3 read as follows:

"Section 3. That before any license is granted by the Commissioner, the applicant therefor must deliver to the Commissioner a good and sufficient cash bond or surety bond executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety, in the amount of Ten Dollars for each one thousand standard packed boxes of citrus fruit that the said applicant intends to deal with during the next twelve months, as set forth in his application, up to and including five hundred thousand standard packed boxes of citrus fruit; provided however, that no bond shall be less than One Hundred Dollars in amount nor greater than Five Thousand Dollars in amount. Said bond shall be in the form approved by the Commissioner and shall be conditioned upon compliance with the provisions of this Act and upon faithful compliance with the conditions of all contracts, verbal or written, made by the citrus fruit dealer with producers and/or any person contracting with the citrus fruit dealer relative to the purchase, handling, sale and accounting of sales of citrus fruit and upon applicant accounting for the proceeds of any citrus

fruit contracted for in accordance with the terms of the contracts with producers. Said bond shall be to the Governor of the State of Florida and his successors in office, in favor of every person with whom applicant deals in the purchase, handling, sale and accounting of sales of citrus fruit. The aggregate accumulated liability under any such bond shall not exceed the amount named therein. Every such bond shall continue in force and effect until notice of the termination thereof is given by registered mail to the Commissioner, and every such bond shall set forth such fact. Any person or producer claiming to be injured or damaged by any act of said citrus fruit dealer, or the Commissioner on behalf of all producers and/or persons contracting with the said citrus fruit dealer may maintain an action on said bond against the citrus fruit dealer and the surety named in said bond, or either of them, and any judgment against the citrus fruit dealer and/or surety in any such action shall include costs. No bond shall be required of any purchaser who pays cash for the fruit which he buys at the time of the sale."

Section 4. That it shall be unlawful in, or in connection with, any transaction relative to the purchase, sale and accounting of sale and handling of citrus fruit:

1. For any citrus dealer to make or exact any fraudulent [fol. 35] charge to and/or from any person.

2. For any citrus dealer to reject or fail to deliver in accordance with terms of the contract without reasonable cause any citrus fruit bought or sold or contracted to be bought or sold by such citrus fruit dealer.

3. For any citrus fruit dealer to discard, dump or destroy without reasonable cause any citrus fruit received by such citrus fruit dealer.

4. For any citrus fruit dealer to make, for a fraudulent purpose any false or misleading statement concerning the condition, quality, quantity, or disposition of or the condition of the market for, any citrus fruit which is received by such citrus fruit dealer or bought or sold or contracted to be bought or sold by such citrus fruit dealer; or the purchase or sale of which is negotiated by such citrus fruit dealer; or to fail or refuse truly and correctly to account promptly in respect of any such transaction in any such

citrus fruit to the person with whom such transaction is had.

5. *For any citrus fruit dealer to knowingly buy, sell, receive, process or handle stolen citrus fruit.*

Note: The italicized portion did not appear in the 1935 Act.

Section 5. Whenever an applicant has paid the prescribed fee, the Commissioner shall issue to such applicant a license which shall entitle the licensee to do business as a citrus fruit dealer unless and until it is suspended or revoked by the Commissioner in accordance with the provisions of this Act but said license shall automatically terminate unless the annual fee is paid within thirty days after notice has been mailed that payment is due.

Section 6. That if any citrus fruit dealer violates any provisions of this Act he shall be liable to the person or persons injured thereby for the full amount of damages sustained [fol. 36] in consequence of such violation. Such liability may be enforced either (1) by complaint to the Commissioner, as hereinafter provided, or (2) by suit in any Court of competent jurisdiction; but this Section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies.

Section 7. *That any person complaining of any violation of any* of any *of the provisions of this Act by any citrus fruit dealer during any shipping season may at any time prior to the expiration of ninety days immediately following the end of such shipping season* apply to the Commissioner by petition, which shall briefly state the facts, whereupon, if in the opinion of the Commissioner the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commissioner to the citrus fruit dealer, who shall be called upon to satisfy the complaint or to answer it in writing within a reasonable time to be prescribed by the Commissioner. After an opportunity for hearing on a complaint the Commissioner shall determine whether or not the citrus fruit dealer has violated any of the provisions of the Act. If after hearing on a complaint made by any person under this Section the Commissioner determines that the citrus dealer has violated any provision of this Act, he shall, unless the offender has al-

ready made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If any citrus fruit dealer does not comply with an order for the payment of money within the time limited in such order, the complainant or any person for whose benefit such order was made, may, *within ninety days* from the date of the order file in any Court of competent jurisdiction [fol. 37] a petition or declaration setting forth briefly the causes for which he claims damages and the order of the Commissioner in the premises. Such suit in such Court shall proceed in all respects like other civil suits for damages, except that the findings and order of the Commissioner shall be prima facie evidence of the facts therein stated, and the petitioner or plaintiff shall not be liable for costs in such Court nor for costs in any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner or plaintiff finally prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

Note: This italicized portion read as follows in the 1935 Act:

"That any person complaining of any violation of any provisions of this Act by any citrus fruit dealer may at any time within nine months after the cause of action accrues apply to the Commissioner by petition, which, etc."

Note: This italicized portion reads as follows in the 1935 Act:

"• • • within one year • • • etc."

Section 8. That whenever the Commissioner determines that any citrus fruit dealer violated any of the provisions of this Act or has violated any of the provisions of any other law of the State of Florida governing and applicable to citrus fruit dealers as herein defined, he may publish the facts and circumstances of such violation and/or by order, suspend the license of such offender for a specific period, or revoke the same or make such other appropriate order as he may deem just and proper, and any such order shall specify the effective date thereof and any order other than

one suspending or revoking a license shall automatically suspend such license until said order is complied with. That any action of the Commissioner with reference to the revocation or suspension of any license granted under the provisions of this Act, may be reviewed by any Court of competent jurisdiction.

[fol. 38] Section 9. That every citrus dealer shall make and keep a correct record showing in detail the following with reference to the purchase, handling, sale and accounting of sale of citrus fruit handled by him, namely:

(a) *The name and address of the producers or other persons from whom the citrus fruit was produced, and if same was procured from some other than a licensed handler, the name and address of the producer of said fruit.*

Note: The italicized portion read as follows in the 1935 Act:

(a) The name and address of the producers.

(b) The date citrus fruit is received and the amount thereof, and the purchase price paid therefor if purchased for the purpose of resale.

(c) The condition of such citrus fruit upon receipt by the citrus fruit dealer.

(d) If the citrus fruit is handled on consignment for the account of the producer, the date of sale and the selling price.

(e) An itemized statement of the charges to be paid by the producer in connection with any sale.

(f) A detailed statement of all claims made by producers against the citrus fruit dealer, a copy of each when received to be certified to and filed with the Commissioner.

(g) A copy of the record and account of sales of citrus fruit handled on consignment and/or commission shall be delivered to the producer upon the consummation of the sale, together with all moneys received by the citrus fruit dealer in payment for such transaction made upon account of the producer, less the agreed commission and other charges which must be separately itemized, and payment and accounting must be made by said citrus fruit dealer to the producer within fifteen days after said citrus fruit

[fol. 39] dealer received the money in payment of said citrus fruit unless otherwise specified in contract between citrus fruit dealers and *producer*.

Note: The word "producer", italicized above, read "grower" in the 1935 Act.

Section 10. That in the investigation of complaints under this Act the Commissioner, or his duly authorized agents, shall have the right to inspect such accounts, records, and memoranda of any citrus fruit dealer as may be required for the determinayion of any such complaint. If any such citrus fruit dealer refuses to permit such inspection, the Commissioner may publish the facts and circumstances and/or by order suspend the license of the offender until permission to make such inspection is given.

Section 11. That the Commissioner, or any officer or employee designated by him for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, receive evidence and require by subpoena the attendance and testimony of witnesses and the production of such accounts, records and memoranda as may be material for the determination of any complaint under this Act. In case of disobedience to a subpoena of the Commissioner, or any of his officers or employees, may invoke the aid of any Court of competent jurisdiction in requiring the attendance and testimony of witnesses and the production of accounts, records and memoranda and any such Court may in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring the person to appear before the Commissioner, or his agents or employee or to produce accounts, records, and memoranda as so ordered, or to give evidence touching any matter pertinent to any complaint and any failure to obey such order of the Court shall be punished by the Court as a contempt thereof.

Section 12. That the commissioner may make such rules, regulations and orders as may be necessary to carry out the provisions of this Act and may cooperate with any [fol. 40] department or agency of the United States Government.

Section 13. That any person who acts as a citrus fruit dealer as defined in this Act without a license, or having a license, violates or aids in the violations of any provision.

of this Act, or any person who represents himself as a citrus fruit dealer but who is not a citrus fruit dealer as defined in this Act, shall for each and every offense be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not exceeding $1000.00 or by imprisonment in the county jail for — more than six months or by both such fine and imprisonment in the discretion of the Court. Civil suits and criminal prosecutions arising by virtue of any of the provisions of this Act may be instituted in the County where the said citrus fruit was received by the citrus fruit dealer, or in the County in which the principal place of business of such citrus fruit dealer is located within the State of Florida, or within the County in which the violation of this Act occurred, or if such violation occurs in more than one county, then within any county in which such violation of this Act occurred.

Section 14. That the several Circuit Courts of the State of Florida, sitting in Chancery, are hereby vested with jurisdiction specifically to enforce and to enjoin and restrain any citrus fruit dealer from violating, the provisions of this Act, or of any rule, regulation or order made by the Commissioner pursuant to this Act in any proceeding brought by the Commissioner in any of said Circuit Courts; and in any such proceeding it shall not be necessary for the Commissioner to allege or prove that an adequate remedy at law does not exist.

Note: The above Section did not appear in the 1935 Act.

Section 15. That it shall be the duty of each state and/or county law enforcement officer to make arrests for violation of this Act when notified of such violation by the Commissioner of Agriculture, or his authorized agent, inspector or representative.

[fol. 41] Section 16. That this act shall be liberally construed and if any part or portion thereof be declared invalid, or the application thereof to any person, circumstance or thing is declared invalid, the validity of the remainder of this Act and/or the application thereof to any other person, circumstance or thing shall not be affected thereby and it is the intention of the Legislature to preserve any and all parts of said Act if possible.

Section 17. That all laws or parts of laws in conflict herewith and the same are hereby repealed.

Section 18. That this Act shall take effect immediately upon its passage and approval by the Governor, or upon becoming a law without such approval.

[fol. 42] EXHIBIT "C" TO COMPLAINT

Resolution & Order

Whereas, Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, by and with the consent and advice of Honorable Fred P. Cone, Governor of the State of Florida, has by proclamation dated the 13th day of January, A. D. 1939, declared the existence of a State emergency in the citrus industry, under authority of Chapter 16862, Laws of Florida, Acts of 1935, known as the Grower's Cost Guarantee Law; and

Whereas, petitions signed by persons, firms, corporations and associations, which this Commission finds own or control 50% or more of the producing acreage of citrus fruit and 50% or more of the producing acreage of grapefruit in the State of Florida, have been presented requesting the Florida Citrus Commission to determine and record in permanent form the average reasonable cost per standard packed box of producing grapefruit; and

Whereas, the Florida Citrus Commission has determined that all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said act; and,

Whereas, the Florida Citrus Commission, based upon said proclamation of the Commissioner of Agriculture and the Governor of Florida, and upon said petitions, having proceeded as authorized and required by said Chapter 16862, Laws of Florida, Acts of 1935, hereby determines and records in permanent form the average reasonable cost per standard packed box of producing grapefruit to be thirty-two (32¢) cents for the citrus fruit season 1938-39;

Now, Therefore, the Florida Citrus Commission does hereby find, determine and order that the average reasonable cost per standard packed box of producing grapefruit

is thirty-two (32¢) cents and that said price be recorded in permanent form for the season 1938-39 and that every contract, agreement, plan or arrangement with the grower by or under which his grapefruit shall be bought, marketed or processed shall be held to require that the person, firm, corporation or association buying, marketing or processing said grapefruit shall in any event pay the grower said cost of production as herein ordered and as provided in Chapter 16862, Laws of Florida, Acts of 1935.

The foregoing resolution and order are unanimously adopted and promulgated by the Florida Citrus Commission in open meeting duly assembled in Lakeland, Florida, on this the 16th day of January, A. D., 1939, and shall become effective at 12:01 a. m. Friday, January 20th, A. D., 1939.

Florida Citrus Commission, By John Maxcy, Chairman.

Attest: Chas F. Chastain, Secretary. (Seal.)

[fol. 43] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed March 23, 1939

In the above entitled cause there having been filed a verified bill of complaint for injunction and likewise praying for restraining order and temporary injunction, and it appearing from said sworn complaint that there is danger of immediate and irreparable damage being caused to the plaintiffs unless defendant is, pending a hearing for temporary injunction, restrained as herein set forth, and the Court being fully advised in the premises it is

Thereupon Considered, Ordered and Decreed that you, Nathan Mayo, as Commissioner of Agriculture of the State of Florida, until further order of this Court, be and you and your assistants, deputies, agents, attorneys, servants, inspectors, employees or other representatives, are hereby temporarily restrained and enjoined from suspending, revoking or cancelling the licenses of the plaintiffs, or any or either of them, as citrus fruit dealers under the Bond and License Law of the State of Florida, and from enforcing [fol. 44] or attempting to enforce in any manner or form whatsoever the resolution or Regulation of the Florida Citrus Commission, dated January 16, 1939, as well as Chapter 16862 Laws of Florida, 1935, known as the Growers'

Cost Guarantee Act, or in any manner molesting or interfering with the plaintiffs or either of them in the operation of their several canning plants and factories because of the failure of said plaintiffs or either of them to comply with said Regulation or said Chapter 16862 Laws of Florida, 1935.

It is Further Ordered that the plaintiffs or one or more of said plaintiffs file a bond herein in the amount of $5,000.00, conditioned as required by law.

It is Further Ordered that a copy of this restraining order be served upon the defendant, Nathan Mayo, as Commissioner of Agriculture of the State of Florida.

Done and Ordered this 23rd day of March, A. D. 1939.

Alexander Akerman, District Judge.

Service of copy hereof on behalf of defendant, Nathan Mayo, as Commissioner of Agriculture of the State of Florida, accepted this 23rd day of March, 1939, at 5:45 P. M.

Wm. C. Pierce, of Counsel.

INJUNCTION BOND

On the 24th day of March, 1939, Injunction Bond in the sum of $5,000.00 was filed and the same was approved as required by law.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPLICATION FOR TEMPORARY INJUNCTION—Filed April 10, 1939

[fol. 45] To: The Honorable Fred P. Cone, Governor of the State of Florida, Tallahassee, Florida; The Honorable George Couper Gibbs, Attorney-General of the State of Florida, Tallahassee, Florida; The Honorable Nathan Mayo, as Commissioner of Agriculture of the State of Florida, Tallahassee, Fla.; Wm. C. Pierce, Esq., Attorney for said Honorable Nathan Mayo, Tampa, Florida; The Florida Citrus Commission, Intervenor; E. Glenn Grimes, Esq., Attorney for said Florida Citrus Commission, Bradenton, Florida.

You and each of you will please take notice that the undersigned, as attorneys for plaintiffs in the above styled cause,

have filed a complaint in this cause, praying for an order restraining and enjoining the enforcement of Chapter 16862 Laws of Florida, acts of 1935, known as Growers' Cost Guarantee Act; that the Honorable Alexander Akerman, District Judge of the above styled court has issued a temporary restraining order dated March 23, 1939.

You and each of you will take further notice that the complaint prays for a temporary injunction, and that the undersigned, as attorneys for the plaintiffs will on April 10th, 1939, at ten o'clock in the forenoon, apply to the Honorable Alexander Akerman and two other Judges constituting a Three-Judge Court, at the Court House at Orlando, Florida, for the issuance of a temporary injunction as prayed in said complaint.

This the 1st day of April, 1939.

John B. Sutton, G. L. Reeves, Attorneys for Plaintiffs.

[fol. 46] State of Florida,
County of Hillsboro:

Before me, the undersigned authority, on this 1st day of April, 1939, personally appeared Agnes Nores, who, being by me first duly sworn, deposes and says that she is employed in the office of John B. Sutton and G. L. Reeves, of Tampa, Florida, counsel for the plaintiffs in the above entitled cause, and that on this date she deposited in an official mail box in the said City of Tampa, Florida, a copy of the foregoing notice, to each of the persons named in the foregoing notice, and at the addresses given in said notice; the envelopes carrying said notices containing sufficient amount of postage to insure delivery.

Agnes Nores.

Sworn to and subscribed before me this 1st day of April, A. D., 1939. Lelah B. Jackson, Notary Public. State of Florida at Large. My Commission expires June 1, 1930. (Seal.)

[fol. 47] In United States District Court

Order Designating Hearing on Application for Temporary Injunction—Filed April 10, 1939

Temporary restraining order having been issued in the above cause on March 23, 1939, to remain in full force and

effect until the further order of this Court, and the plaintiffs having prayed for temporary injunction;

Now Therefore pursuant to Section 3 (a), Title 28 U. S. C. A., I hereby call to my assistance for the hearing and determination of the application for temporary injunction the Honorable Robert T. Ervin, United States District Judge, in and for the Southern District of Alabama, and the Honorable Alexander Akerman, United States District Judge for the Southern District of Florida, the hearing of [fol. 48] said application to be held on April 10, A. D., 1939, at ten o'clock in the forenoon in the Court House, in the City of Orlando, State of Florida.

Dated this 10th day of April, A. D. 1939.

Leon McCord, U. S. Circuit Judge.

We consent to this order being signed by Judge McCord.
John B. Sutton, G. L. Reeves, Atty's for Plaintiffs.
H. E. Carter, Atty. for Defendant.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO COMPLAINT—Filed April 10, 1939

Comes now the above named plaintiffs, and with leave of Court amends their complaint heretofore filed in this cause by adding thereto a paragraph to be known as Paragraph XXIII-A to read as follows:

"XXIII-A. Plaintiffs further allege by reason of the facts and circumstances herein alleged the Statute under attack and the Resolution and Order of the Florida Citrus Commission issued thereunder, violate the Constitution of the United States in that they impair the obligations of [fol. 49] the contracts of these plaintiffs and deny, impair and restrict the right of the plaintiffs to freedom of contract as guaranteed by the Constitution of the United States; they abridge the rights of personal liberty of these plaintiffs, and arbitrarily interfere with the private business of these plaintiffs and prohibit the lawful occupations of these plaintiffs, and impose unreasonable and unnecessary restrictions thereon, to the extent that they violate the Constitution of the United States; the said Statute and Resolution violating the Fourteenth Amendment of the Constitu-

tion of the United States, as well as Article 1, Section 10 thereof.

John B. Sutton, G. L. Reeves, Attys. for Plaintiffs.

Duly sworn to by C. E. Lindsey. Jurat omitted in printing.

[fol. 50] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CHAS. F. CHASTAIN—Filed April 10, 1939

Before me, the undersigned authority, on this day personally appeared Chas. F. Chastain, to me personally known, who being first duly sworn deposed and on oath stated:

My name is Chas. F. Chastain and I reside in Lakeland, Polk County, Florida. I am employed by the Florida Citrus Commission as Secretary. On January 6, 1939, at the request of citrus fruit producers, including grapefruit producers, the Florida Citrus Commission instructed its employees to gather and compile all available information in regard to the cost of producing grapefruit in the State of Florida. These instructions of the Commission were followed and at a meeting of the Commission on January 16, 1939, this information was made available to the Commission. The information consisted of data and figures showing cost of production of grapefruit on several hundred groves in Florida over a period of several years. At the same meeting, January 16, 1939, the Commission received from the Commissioner of Agriculture a declaration in which the Commissioner declared the existence of a State Emergency in the grapefruit industry of Florida and called upon the Commission to take such action as might be necessary to put into effect the provisions of the Growers' Cost Guarantee Act, which is Chapter 16862, Laws of Florida, Acts of 1935. At the meeting on January 16, 1939, there was also presented to the Commission petitions which were signed by producers of citrus fruit in Florida, including producers of grapefruit, and which the Commission instructed Mr. T. L. Hodson, Assistant Secretary, to check [fol. 51] against the Federal Emergency Relief Administration survey and supplemental surveys of citrus producing acreage in Florida. This was done and report made to the

Commission that the acreage of citrus fruit represented in said petitions considerably exceeded fifty (50) per cent of the total acreage of citrus fruit in the State. At the same meeting Mr. W. W. Hubbell, Chief Field Agent for the Commission, acting under instructions previously given, and Mr. R. H. Howard, Assistant Extension Economist of the Agricultural Extension Service, University of Florida, at Gainesville, Florida, submitted to the Commission information and data relating to the cost of production of grapefruit in Florida as compiled from costs of several hundred groves over a period of several years and from which was computed the average cost of production of grapefruit for the 1938-39 season. The Commission went fully into the subject of arriving at the average cost of production of grapefruit. In addition to all available information on the subject, the members of the Florida Citrus Commission are experienced citrus fruit producers or handlers, as they are required by law to be, and in arriving at the cost of production of grapefruit they discussed information obtained through their own experience and knowledge of the growing of citrus fruit.

In deliberating on the matter and in arriving at determinations the Commission, with the advice of its Attorney, followed the requirements and conditions in the Growers' Cost Guarantee Act. It found and determined that all handlers of citrus fruit in the State of Florida were subject to the provisions of the Act, and further found and determined that the average reasonable cost per standard [fol. 52] packed box of producing grapefruit in Florida for the 1938-39 season is thirty-two (32) cents, and accordingly fixed this sum as the cost of production. Upon the basis of all of the proceedings and after complying with the conditions and requirements in the law, the Commission adopted and entered a Resolution and Order making the determinations mentioned.

Chas. F. Chastain.

Sworn to and subscribed before me this 8th day of April, A. D. 1939. Myrtle Barksdale. My com. exp. 12-3-40. (Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. F. MAYS—Filed April 10, 1939

[fol. 53] Before me, personally appeared the undersigned authority, J. F. Mays, who after being first duly sworn, upon oath, deposes and says:

That he is in charge of the Bond and License Department of the Department of Agriculture of Florida, which Department is responsible for the enforcement of Chapter 16862, Laws of Florida, Acts of 1935, known as the Growers Cost Guarantee Law. That said Growers Cost Guarantee Law, from January 19, 1939, to the date of the restraining order in this case, was enforced with respect to all cooperative associations in the State of Florida, as well as independent dealers. That there was one cooperative canning plant operating during said time, namely, the Florida Citrus Canners Cooperative at Lake Wales, Florida. That inspectors of the Department of Agriculture made regular inspections from time to time at the plant of the Florida Citrus Canners Cooperative at Lake Wales, for the purpose of checking on their compliance with the Growers Cost Guarantee Law, and found it to be a fact that this Cooperative regarded themselves as coming within the provisions of this Act and were and are, in good faith, complying therewith. Likewise, all fresh fruit cooperative shippers were checked by inspectors of the Department and were found to be complying with the Growers Cost Guarantee Law by refusing to ship grapefruit for their members unless a net of 32¢ per box on the tree could be realized for the producers.

Affiant further states that the so-called grower-canners operating in Florida, have separate corporations for the ownership of the grove properties where the grapefruit is produced and the canning and shipping plants, where the [fol. 54] products are processed for marketing. That the Department of Agriculture has enforced the Growers Cost Guarantee Law during the period of its enforcement against such canning corporations, upon the theory that since they were contracting agencies, they were subject to the Law.

Affiant further deposes that he knows of several canning corporations in Florida, that have operated during all or part of the time while the Act was being enforced, that consistently paid the grower 32¢ per box for his grapefruit

in compliance with the Law, and that such canning plants made a profit in their business.

Affiant further says that the Commissioner of Agriculture has enforced the Law strictly, fairly, uniformly and impartially during all periods of enforcement against independent dealers, cooperative associations and so-called grower-shippers and grower-canners.

J. F. Mays, Affiant.

Subscribed and sworn to before me, this 10th day of April, 1939. Leona Torrey, Notary Public. My commission expires Feb. 9, 1942. (Seal.)

IN UNITED STATES DISTRICT COURT

ADDITIONAL AFFIDAVIT OF CHAS. F. CHASTAIN—Filed April 10, 1939

[fol. 55] I, Chas. F. Chastain, Secretary to the Florida Citrus Commission, certify that the attached is a full, true and correct copy of a Resolution and Order unanimously adopted by the Florida Citrus Commission in meeting duly assembled at Lakeland, Florida, on January 16, 1939.

Witness my hand as Secretary aforesaid and the seal of the Florida Citrus Commission at Lakeland, Florida, on this the first day of March, 1939.

Chas. F. Chastain, Secretary. (Seal.)

[fol. 56] Resolution & Order

Whereas, Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, by and with the consent and advice of Honorable Fred P. Cone, Governor of the State of Florida, has by proclamation dated the 13th day of January, A.D., 1939, declared the existence of a State emergency in the citrus industry, under authority of Chapter 16862, Laws of Florida, Acts of 1935, known as the Grower's Cost Guarantee Law; and

Whereas, petitions signed by persons, firms, corporations and Associations, which this Commission finds own or control 50% or more of the producing acreage of citrus fruit and 50% or more of the producing acreage of grapefruit in the State of Florida, have been presented requesting the Florida Citrus Commission to determine and record in

permanent form the average reasonable cost per standard packed box of producing grapefruit; and

Whereas, the Florida Citrus Commission, has determined that all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said act; and,

Whereas, the Florida Citrus Commission, based upon said proclamation of the Commissioner of Agriculture and the Governor of Florida, and upon said petitions, having proceeded as authorized and required by said Chapter 16862, Laws of Florida, Acts of 1935, hereby determines and records in permanent form the average reasonable cost per standard packed box of producing grapefruit to be thirty-two (32¢) cents for the citrus fruit season 1938-39;

Now, Therefore, the Florida Citrus Commission does hereby find, determine and order that the average reasonable cost per standard packed box of producing grapefruit is thirty-two (32¢) cents and that said price be recorded in permanent form for the season 1938-39 and that every contract, agreement, plan or arrangement with the grower by or under which his grapefruit shall be bought, marketed or processed shall be held to require that the person, firm, corporation or association buying, marketing or processing said grapefruit shall in any event pay the grower said cost of production as herein ordered and as provided in Chapter 16862, Laws of Florida, Acts of 1935.

The foregoing resolution and order are unanimously adopted and promulgated by the Florida Citrus Commission in open meeting duly assembled in Lakeland, Florida, on this the 16th day of January, A.D., 1939, and shall become effective at 12:01 a.m. Friday, January 20th, A.D., 1939.

Florida Citrus Commission, by John Maxcy, Chairman.

Attest: Chas. F. Chastain, Secretary. (Seal.)

[fol. 57] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN MAXCY—Filed April 10, 1939

Before me, the undersigned authority, on this day personally appeared John Maxcy, to me personally known, who after being first duly sworn, deposed and on oath stated:

"My name is John Maxcy. I reside at Frostproof, Polk County, Florida. I am Chairman of the Florida Citrus

Commission, which position I have occupied since October, 1937. I was present at all of the meetings of the Florida Citrus Commission at which the matter of putting into operation the provisions of Chapter 16862, Laws of Florida, Acts of 1935, known as the Growers' Cost Guarantee Act, was considered and I am familiar, from my own personal knowledge, with the facts and circumstances in connection with the Commission proceedings and action by which the resolution and order determining and fixing the cost of production per standard packed box for grapefruit for the 1938-39 season was arrived at and adopted.

On the 6th day of January, 1939, at a meeting of the Florida Citrus Commission duly held in Lakeland, Florida, at the headquarters of the Commission, based upon a request from grapefruit growers in Florida, the Commission instructed its employees, including the Chief Field Agent, to immediately proceed to gather, assemble and compile all information possible relating to the cost of production [fol. 58] of grapefruit in Florida. Such instructions being given in compliance with the requirements of Chapter 16862, Laws of Florida, Acts of 1935.

On January 16th, 1939, at a meeting of the Florida Citrus Commission duly held in Lakeland, Florida, a declaration by Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, issued by and with the consent of Honorable Fred P. Cone, Governor of Florida, was presented and filed with the Commission, by which the Commissioner of Agriculture declared the existence of a State emergency in the grapefruit industry and which declaration was promulgated under the provisions of the Growers' Cost Guarantee Act. At the same meeting on January 16, 1939, there was presented and filed with the Commission, petitions signed by persons, firms, cooperations or associations owning or controlling fifty per cent (50%) or more of the producing acreage of citrus fruit, including fifty per cent (50%) or more of the producing acreage of grapefruit in the State of Florida, requesting the Florida Citrus Commission to proceed as required by law to put into operation the provisions of the Growers' Cost Guarantee Act with reference to grapefruit. Based upon the declaration of the Commissioner of Agriculture and the Governor and upon petitions referred to, which the Commission found to represent more than fifty per cent (50%) of the citrus producing acreage and more than fifty per cent (50%) of the grapefruit pro-

ducing acreage in Florida, the Commission considered the fixing of the cost of production of grapefruit as authorized and required by the Growers' Cost Guarantee Act.

[fol. 59] After considering all of the information available relating to the cost of production of grapefruit, which information included compilations of data supplied by the Chief Field Agent for the Commission and the Agricultural Extension Service of the University of Florida, the Commission found, determined and ordered that the average reasonable cost per standard packed box of producing grapefruit was thirty-two cents (32¢) and that said price be recorded in permanent form for the season 1938-39."

John Maxey.

Sworn to and subscribed before me this the 8th day of April, A.D., 1939. Chas. F. Chastain, Notary Public, State of Florida. My Commission Expires: Notary Public, State of Florida at Large. My commission expires Nov. 7, 1939. (Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF T. L. HODSON—Filed April 10, 1939

[fol. 60] Before me, the undersigned authority, on this day personally appeared T. L. Hodson, to me personally known, who being first duly sworn deposed and on oath stated:

My name is T. L. Hodson and I reside in Lakeland, Polk County, Florida. I am employed by the Florida Citrus Commission as Assistant Secretary. On January 16, 1939, I was instructed by the Florida Citrus Commission to check petitions signed by citrus growers in Florida, including growers of grapefruit, requesting the Florida Citrus Commission to put into operation the provisions of the Growers' Cost Guarantee Act. Such petitions showed the acreage of citrus fruit, including the acreage of grapefruit, produced by each of the growers whose signatures appeared on said petitions. The total acreage of citrus fruits represented in said petitions was considerably in excess of fifty (50) percent of the total citrus producing acreage in the State of Florida as shown by information compiled by the Federal Emergency Relief Administration

and supplemental information as required in the Growers' Cost Guarantee Act. My report to the Florida Citrus Commission, pursuant to instructions, showed that the citrus producing acreage represented in the petitions presented to the Commission was more than fifty (50) percent of the [fol. 61] total citrus producing acreage in the State of Florida.

T. L. Hodson.

Subscribed and sworn to before me, this 8 day of April, A.D., 1939. Chas. F. Chastain, Notary Public, State of Florida at Large. My commission expires No-. 7, 1939. (Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. W. HUBBELL—Filed April 10, 1939

Before me, the undersigned authority, on this day personally appeared, W. W. Hubbell, who being first duly sworn, deposes and on oath states:

"My name is W. W. Hubbell and I am now and was on and prior to January 16th of this year, employed as Chief Field Agent for the Florida Citrus Commission. In the course of my duties I was directed by the Florida Citrus Commission to obtain and submit to the Commission for consideration at a meeting on January 16th, 1939, information and data relating to the average reasonable cost per standard-packed box of producing grapefruit in the State of Florida for the crop season, 1938-39. In following out the instructions of the Commission, I gathered and compiled information from growers and shippers of grapefruit in Florida, used information available from various sources and consulted with and obtained information from the De- [fol. 62] partment of Agricultural Economics of the Agricultural Extension Service, University of Florida, at Gainesville, Florida. At the meeting of the Florida Citrus Commission in Lakeland, Florida, on January 16, 1939, I submitted to the Commission an estimated figure, based upon all of the studies and information available, which showed the average reasonable cost per standard packed box of pro-

ducing grapefruit in Florida for the season, 1938-39, to be thirty-two cents (32¢)."

W. W. Hubbell.

Sworn to and subscribed before me this the 31st day of March, A.D., 1939. T. L. Hodson, Notary Public, State of Florida at Large. My commission expires Jan. 18, 1942. (Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. H. HOWARD—Filed April 10, 1939

[fol. 63] Before me, the undersigned authority, on this day personally appeared R. H. Howard, to me personally known, who being first duly sworn deposed and on oath stated:

"My name is R. H. Howard. I reside in Gainesville, Florida and I am now and was prior to January 1, 1939, Extension Economist, of the Agricultural Extension Service of the University of Florida, in which capacity I had occasion, during a period of several years last past, to study extensively the cost of producing citrus fruits in Florida, including the cost of producing grapefruit. I have prepared bulletins and special articles which have been published upon this subject. In January of this year, at the request of the Florida Citrus Commission, I made available to the Commission information regarding the cost of production of grapefruit in Florida. The information and data which has been gathered by the Agricultural Extension Service of the University of Florida and which formed the basis for the information given to the Florida Citrus Commission was arrived at by taking the cost of production of citrus fruit upon a representative number of citrus groves. The estimated cost of production of grapefruit for the 1938-39 season was arrived at by using the costs of production for previous seasons, due regard being held for the costs per acre and the probable production per acre. The costs for [fol. 64] the current season would have to be estimated as no definite cost per box could be arrived at until the entire crop has been harvested and the production per acre ascertained. I regard the figures arrived at, of thirty-two cents (32¢) per standard packed box for grapefruit for the

1938-39 season, to be a reasonable and fair cost of production."

R. H. Howard.

Sworn to and subscribed before me this the 8th day of April, A. D. 1939. Mary L. Johnson, Notary Public, State of Florida. My Commission Expires: Notary Public, State of Florida at Large. My Commission expires June 4, 1942. (Seal.)

[fol. 65] IN UNITED STATES DISTRICT COURT

Transcript of Testimony—Filed July 7, 1939

Taken on hearing before Hon. Leon McCord, U. S. Circuit Judge, Hon. Robt. T. Ervin, U. S. District Judge, and Hon. Alexander Akerman, U. S. District Judge, composing a Three-Judge Court sitting in U. S. District Court, Orlando, Orange County, Florida, on April 10, 1939, at 10 o'clock A. M.

APPEARANCES:

Hon. G. L. Reeves and John B. Sutton, Esq., representing the plaintiffs,

Judge H. E. Carter, Asst. Attorney General of Florida, Judge O. K. Reaves, and Wm. C. Pierce, Esq., representing Nathan Mayo, as Commissioner of Agriculture, defendant, and E. Glenn Grimes, Esq., representing the Citrus Commission, and

Ed. R. Bentley, Esq., representing the Florida Citrus Growers, Inc., intervening petitioner-defendant.

COLLOQUY

The Court: I believe there is someone that has an intervention.

G. L. Reeves: We expect to offer some evidence this morning; the gentlemen are in the room. Do you want to put them under the Rule?

Judge Reaves: Do I understand they are going to take testimony of witnesses at this hearing or use affidavits?

The Court: We have no rule about it. I am willing to hear testimony. I think we should relax the Rule.

G. L. Reeves: This suit is brought to test the validity [fol. 66] of the law of Florida known as the Growers Cost & Guaranty Law. I think it would be well to read that act first.

(Reading.)

"An Act Relating to Citrus Fruit: Prescribing Conditions and Limitations Upon the Sale, Marketing and Processing Thereof, and the Effect of Contracts of Sale and of Marketing and Processing Agreements.

Whereas, it is found by the Legislature and hereby declared that the production and distribution of citrus fruit is a paramount industry in Florida upon which the prosperity of the State in a large measure depends; that such fruit and *and* juices thereof have become and are generally used in great and rapidly increasing quantities, both voluntarily and upon advice of physicians, by people of all classes, ages and conditions; that it is necessary for the reasonable comfort, welfare and health of the people and in order to build up their strength and vigor that an adequate and dependable supply of high grade citrus fruit be constantly available, and the production, transportation, processing, distribution and sale of citrus fruit in the State of Florida is therefore hereby declared to be a business affecting the public health and interest, that unfair, unjust, destructive, demoralizing, and uneconomic trade practices have been and are continuing to be carried on in the sale and distribution of citrus fruit in this State to the extent that such fruit has been and is continuing to sell in many cases at prices below the cost of production and the constant, dependable and adequate supply of such fruit for sale and consumption [fol. 67] is thereby so seriously imperiled as to threaten the breakdown of the industry; that the present acute economic condition in Florida is in part the consequence of a severe and increasing disparity between the prices of citrus fruit and other commodities; that it is both expedient and necessary to build up the quality and reputation of Florida's citrus fruit in the market and to stabilize the Florida citrus industry and to protect the public and the growers against fraud, deception, and financial loss through further continuation of unscrupulous practices and haphazard methods in connection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit,

Therefore, in the exercise of the police power of the State for the purpose of protecting and promoting the public health and general welfare,

Be it Enacted by the Legislature of the State of Florida:

Section 1. This Act shall be known and called the Growers Cost and Guarantee Act.

Section 2. The term "Citrus Fruit" as used herein means and includes only the fruits Citrus Grandis, Osbeck, commonly called grapefruit, and Citrus Sinensis, Osbeck, commonly called oranges, and Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

The term "standard packed box" means 1-3/5 bushels whether in bulk or in a container.

That Act was passed in 1935, and the Florida Citrus Commission passed a resolution on the 16th day of January, 1939, to become effective on January 20th, pursuant to pro-
[fol. 68] visions in that act. (Reading resolution and order.)

There is in existence another Act which is commonly known as the Bond & License Act, passed in 1937, a copy of which is attached to the Bill of Complaint, which is rather long, and I will not take the time to read it, but I will attempt to show the Court how that is involved in this Act • • •.

This Act provides for people dealing with citrus, called citrus fruit dealers, and which includes people in the business of canning grapefruit and grape fruit juice, and whom we represent in this case, must put up bond and procure a license; the bond provides that they carry out the agreements with the grower. Now under that Act the Commissioner of Agriculture is given authority to revoke the license of citrus fruit dealers when they violate that Act, and in the Section giving that authority it is further stated that "for the violation of this Act or any other citrus Act applicable to citrus fruit dealers", therefore the plaintiff in this case, who are canners, have been threatened by the Commissioner of Agriculture to have their license revoked under the Florida License Act, because of their failure to pay .32 under this Act, and this suit is therefore brought in an effort to obtain relief and to enjoin the Commissioner of Agriculture from revoking that license. I will run through the Bill——

The Court: We have all read it.

Mr. Reeves: Then I will point out to the Court our position in this matter. It is our understanding that at this

hearing it is not necessary to go into all the merits of the case, to make a final determination, but it is our duty to show that there is a substantial question involving jurisdiction [fol. 69] matter and credit, which we ask you to enjoin, and we shall receive irreparable damage unless the relief is granted that is prayed for. We feel that in this suit there are some novel questions involved, and that the Court should go ahead and protect us until final hearing, until we can get the testimony in and the issues made up. As I understand it, no papers have been filed by the defendants or either of them.

The Court: I think the Florida Citrus Commission have asked to intervene.

Mr. Grimes: That is correct.

Mr. Reeves: Briefly, your Honor, it is our contention that this Act violates the Commerce Law of the Constitution, which attempts to cast the burden upon Interstate Commerce. 99% of our products go into Interstate Commerce, and we take the position that this Act is arbitrary and unreasonable. We take the position that the Act is discriminatory for this reason; that canning plants owned by growers themselves, or canning plants owned by cooperative associations are not burdened with this Act, and that as competitors of what we refer to as independent canners, whom we represent, these canning plants have continued and are continuing to operate, not subject to the provisions of this Act, that they have been buying their supplies and raw products at the current market prices, caused by supply and demand, which is far less than .32, and that these plants are producing the canned finished product, and offering the same for sale at a price which will not give to the grower .32 on the tree. The Florida Citrus Commission went a little further, and said that the .32 referred to was on the tree, and make an allowance of .07 for bringing it into the plant, so [fol. 70] it would be .39 delivered to the plants; that therefore, we are unable to compete with these other people in the State of Florida, who are going right ahead with their business, and therefore this Act is discriminatory.

The Court: They also buy from others, don't they?

Mr. Reeves: No sir, the Cooperative Association are made up of a large number of owners, who put out all of their product.

The Court: Their own product only?

Mr. Reeves: Yes sir. They are not buying on the market; they are just using their own at such prices. We also take the position and urge that under the law we have this pedler question involved, that under the law there is a federal question involved * * *.

The Court: I notice your Bill doesn't make any specific charge as to the violation of the contract right—freedom of contract, but you do pray for any relief.

Mr. Reeves: That's right * * * I didn't go specifically into that at the time. The Supreme Court of Florida has ruled that with a certain kind of contract these canners were operating under it was in violation of the Statute, and we were advised by the Commissioner of Agriculture that unless we did something that their license would be revoked. I feel like we do have in the Bill sufficient for the relief. There is one point that seems to us rather important in this case, and that is this: This Growers Cost Guarantee Law seems to have been passed for the purpose and that the only reason it was passed, was to guarantee the grower receive his .32 on the tree, and that it makes no provision for penalty for violation of the Act. All that Act does is to create a liability on the part of anyone who deals with the grower to [fol. 71] pay them .32, and that therefore the Commissioner of Agriculture, under the Foreign License Law has no authority whatsoever to revoke a license for anyone to deal with the grower without paying .32 on the tree. One point I would like to call to the attention of the Court—several of the canners after this regulation went into effect, attempted to operate under a contract whereby the owners whose fruit was decaying and rotting and couldn't sell it to the canners, asked them to can the fruit for them and charge the proper price for canning it, the canned products belonged to the owner. It was felt that that was not in violation of the law, however the Supreme Court of Florida said that it was in violation of the law, and therefore that practice had to stop, and we contend that each of our plaintiffs, unless the relief prayed for is granted, will suffer damage far in excess of $3,000.00. With that preliminary statement I would like to call one or two witnesses to the stand.

Thereupon, to maintain the issues on their behalf the plaintiffs produced as a witness one.

C. E. LINDSEY, who being first duly sworn, testified as follows:

Direct examination.

By Mr. G. L. Reeves:

Q. You are Mr. C. E. Lindsey?
A. Yes, sir.
Q. You are in the canning business of the State of Florida?
A. Yes, sir.
Q. What is the name of your company?
A. Lakeland Highlands Canning Co.
Q. Where does that company operate?
A. Near Highlands City, Florida.
[fol. 72] Q. That's near Lakeland, is it?
A. Yes.
Q. Mr. Lindsey, you have gone over the bill of complaint—you did not swear to the bill of complaint, did you?
A. No.
Q. You have gone over it with us, though, have you not?
A. Yes.
Q. You have gone over the facts alleged in there, have you?
A. Yes, sir.
Q. Are those facts true and correct?
A. Yes, sir.
Q. Now, Mr. Lindsey, tell the Court please what the situation in the citrus crop, this year, is, as compared with other years; in other words, is this a large or small crop this year?
A. This is the largest crop ever grown in the State of Florida, and the largest crop in the nation—this year's production is.
Q. You say it is the largest in the nation—is grapefruit grown in other sections of the country?
A. You mean in the United States?
Q. Yes.
A. Yes, in California, Arizona, Texas, Porto Rico and Florida.
Q. Which of those sections, if any, compete with Florida?
A. The largest competitor is Texas, by reason of the volume being near the volume grown in Florida.
Q. Do you know the estimated crop in Texas this season?

A. I think the federal estimate was 15 million boxes for Texas and 21 million 500 thousand for Florida.

[fol. 73] Q. Is that the largest Texas has ever had?

A. Yes, sir.

Q. How long have you been in the canning business in Florida?

A. 12 or 14 years.

Q. Now going back a few years can you tell us any particular season that was large enough to use it as a comparison with this year?

A. The largest production was two seasons back prior to this season.

Q. That would be in 1936 and 1937?

A. 1936-37.

Q. This regulation that is involved in this suit went into effect about January 19th; were you and the other canners of the State of Florida operating prior to that time?

A. Yes.

Q. Approximately when does the canning season open?

A. There is some variance. As I recall the canning started generally about the first of November, this season, November, 1938.

Q. Does that vary a little?

A. At times, yes. I think possibly the preceding year, by reason of the later maturity it was near December 1st before the plants started operating.

Q. From the time they have operated, up until January 19th, you had no price fixing law controlling you, did you?

A. No, sir.

Q. Were plants operating pretty good volume during that time?

A. Yes.

Q. Can you tell us approximately what fruit was being [fol. 74] bought for canning purposes—grapefruit?

A. You mean prior to the invoking of this law?

Q. Yes.

A. Well, the purchasing of fruit is based on two different grades one is for the hearts, which means medium sized fruit, for sections. That price was .25 a box at the plant; for the juice it was approximately .15. That would be the extreme small and extreme large sizes used for juice.

Q. The fruit you buy for juice you do not pay as much for as you do that well rounded out and used for sections.

A. No.

Q. Mr. Lindsey, can you tell us approximately what canned grape fruit juice would have to bring in order to give the grower 32 cents on the tree?

A. Approximately sixty-five and sixty-seven and a half perhaps; that depends upon whether it is sweetened or unsweetened. There is a variation in the cost of sugar.

Q. Do you know what grapefruit juice, canned, in Texas, has been selling for?

A. At the present time I think you can buy extreme large quantities unsweetened at 42½ cents. In speaking of these prices I am speaking of No. 2 cans.

Q. You are using that as the basis?

A. Using that as the basis. The other sizes would be proportioned.

Q. Of course, if you met the Texas competition at 42 cents, you would either take a tremendous loss paying 32 cents here, or you just couldn't operate, is that it?

A. That is correct.

Q. For sections—grapefruit that is capable of being put into sections—if you paid 32 cents for that, what would [fol. 75] you have to sell it for—the finished product?

A. That would be quoted from 85 cents up, depending on the quantity of sugar that would be used in the processing.

Q. Mr. Lindsey, from the time this order went into effect in January, was there any of the grapefruit canned in Florida by Cooperative Grower Owned Plants?

A. During that period?

Q. Yes.

A. Yes, sir.

Q. Do they compete with your business?

A. Yes, sir, the grower owned and cooperatives enjoy about 30 per cent of the volume of the canning industry of the State of Florida, in citrus.

Q. They handle about 30 percent?

A. Yes, sir.

Q. Do you know what the Cooperative or Grower Owned were selling their finished product for—take hearts for instance?

A. They were selling in the earlier stages of the invoking at 75 cents a dozen.

Q. Do you know that as a positive fact?

A. Yes, sir.

Q. Did you buy some of those?

A. I did.

Q. Then that fruit could not have net-ed the owner 32 cents, could it?

A. On the tree—no.

Q. In your business and in the business of the other plaintiffs, do you take orders ahead of time, or after you get your fruit packed, or how?

[fol. 76] A. We operate both ways. We take orders sometimes for later shipment; other times we will have it manufactured for immediate shipment.

Q. When this regulation went into effect in January, 1939, did you have any orders for the finished product outstanding?

A. Yes, the first of January we did.

Q. How much?

A. I am not sure, somewhere between 100,000 and 200,000 cases.

Q. You had orders existing that you had not filled?

A. Yes.

Q. Was that at a definite price?

A. Yes.

Q. Then when the regulation went into effect you had to pay 32 cents, and could you fill those orders then?

A. We could not fill them without losing money.

Q. Would you have lost a substantial amount?

A. Yes.

Q. Would that have exceeded $3,000.00, Mr. Lindsey?

A. Yes, a lot more than $3,000.00.

Q. What happened—did you get out of those orders?

A. We took it up with the distributors whom we were serving, and advised them what had happened—of the invoking of the law, and that was termed an emergency, and we asked to be relieved from the filling of them, or at least deferring it until we could see what occurred, and it was granted in every instance. The people we were serving—these were real old customers that we had had for sometime with the exception of one or two, which were rather new customers—they granted that, and made purchases evidently in other directions, and we have lost them.

[fol. 77] Q. You are operating under the protection of this injunction now, are you?

A. Yes.

Q. Since you have been operating under the protection of this injunction have those people dealt with you again?

A. All except one or two.

Q. You have lost those?

A. Yes, at least they are not ordering. We never like to think we have lost them permanently.

Q. This canned grapefruit, does it compete with other canned articles?

A. Other canned fruit?

Q. Yes.

A. Yes, sir.

Q. Name some of those it competes with?

A. In your juices you compete with the tomato, with the pineapple—that perhaps would be the heavier commodities that we compete with. Then in the fruits, almost any canned fruit would be competition with another canned fruit.

Q. Take this year as compared with the year you mention, which was the largest year,—1936-37—up until this bill of complaint was filed about March 23rd, 1939, what was the comparison in the canning finished product as with around 1936-37?

A. There was about two million cases less packed around the 15th and 20th of January in comparison with the corresponding date two years ago.

Q. What was the cost of it?

A. I think I should make a correction. I said in January —I mean in March. That was by reason of the inactivity of [fol. 78] this period during from around the middle of January until this date in March, with canners that buy and pay cash for their fruit.

Q. Inactivity was the cause of it?

A. Yes.

Q. Up until January 19th you were running as usual?

A. Yes.

Q. But from January 19th to March 23rd is where your deficit showed up?

A. Yes.

Q. That's about two million cases?

A. Yes, sir.

Q. What happened to that fruit that was usually going into cans during that period of time?

A. There is perhaps some of it still on the tree; there has been a large percentage that has dropped in all the groves.

Q. Do you know whether or not any of the growers in the State of Florida are willing to sell their fruit at less than 32 cents except for the provisions of this Act?

A. Yes, any number of them.

Q. Could you have gone on and bought fruit for less than 32 cents?

A. An unlimited amount.

Q. Is it a fact that according to this Act some fruit has had to decay and rot, and the grower couldn't get anything for it?

A. Yes.

Q. Mr. Lindsey, will you explain to the Court, please, something about your operation of the plant, to show what your loss would be in case you cannot operate? I will ask [fol. 79] you this preliminary question first; if this law is upheld and the injunction is not granted, and you are forced under the provisions of the Law, can you operate your business and pay 32 cents without losing money?

A. For the balance of this season?

Q. At this time, yes.

A. In my opinion I cannot.

Q. You don't know what next year will do?

A. That's right.

Q. If you have to close down, how does your loss run; to make it clear, if you close down you are not making a profit, you would have been making if you operate, is that so?

A. I would not.

Q. In addition, do you have any regular expenses or costs that would run against you while you closed down?

A. I imagine our costs would be at least $500.00 a week that we couldn't get away from for sometime at least. In other words, we would have to dissipate all of our organization, which is the sales, and clerical and management. I think that would run fully $500.00 a week.

Q. That's a regular expense that you pay out?

A. Yes.

Q. That would run over from now to the end of the season, $3000.00 or $4000.00 alone, that item, would it?

A. That would continue through the entire year. You have to keep your organization, and while you are not operating all the year you have hopes of having secured sufficient amount of profit to have sustained these people so as to have them the year around.

Q. Usually when the season is over you have to maintain [fol. 80] them anyway, is that right?

A. Yes.

Q. Except for this year you would be operating and getting the use of them at this time, would you?

A. Not only that; we would acquire sufficient amount to carry them for the inactive period.

Q. In this case, you are somewhat familiar with the business of the other plaintiff's are you?

A. Yes.

Q. Tell us how many employees are used in the business of these plaintiffs?

A. You mean the total of all of us?

Q. Yes.

A. I imagine around 5,000 or 6,000 people.

Q. Do you know what the weekly payroll would run?

A. It would probably be around $100,000.00 a week during your operating period, which is this time of the year.

Q. How much of the canned Florida grapefruit goes into Interstate Commerce?

A. Practically all. It would be over 99%.

Q. Do you sell any foreign countries?

A. Yes.

Q. Where?

A. Its scattered in a number of countries, but the bulk of it goes to the United Kingdom.

Q. Tell the Court how much goes to the United Kingdom every year?

A. Approximately a million cases.

Q. Do you know approximately what percentage of the grapefruit grown in the State of Florida is for canning purposes?

[fol. 81] A. That would vary perhaps with the total yield. I think it is perhaps around 40 per cent.

Q. That has been increased every year, has it?

A. Yes, it has.

Q. Do you know what the canners in the State of Texas have been paying for their requirements?

A. Yes. I was with Mr. Hall of Texas a week ago, and he says they are buying——

The Court: If you are testifying from hearsay, don't do that.

Q. Do you know what the market is out there?

A. The market for the raw product.

Q. What is that?

A. $1.50 to $2.50 on the tree, per ton.

Q. What does that amount to per field box?

A. 23½ boxes to the ton.

Q. Tell us what that would amount to per field box?

A. Roughly six to twelve cents a box—six to ten cents a box.

Q. That's the market, what they are paying, and they are competing with your product, are they?

A. In a big way.

Q. You are talking about competing with Texas. Does the Florida canned citrus product and the Texas canned citrus product bring the same amount in the market?

A. In the unsweetened I would say yes, but on the sweetened Florida will enjoy a little higher price for their product than Texas.

Q. Will that differential in the price be sufficient to enable you to pay 32 cents and compete with their ten, twelve [fol. 82] and fifteen cents over there?

A. No, not at all. Their juice is practically all packed as unsweetened, and I do not believe that Florida can enjoy any material advance over their quotations in the distributing market.

Q. Generally, how is that Florida canned grapefruit distributed—what means are used for that?

A. You mean in the shipment of it or in the disposing of it?

Q. I mean do you use dealers or distributors, or how is it handled, when it leaves here where does it go?

A. It is shipped to the Northern States or Western, or Export. It is purchased by the chain stores and wholesale distributors, who in turn send it on its way to the consumer.

Q. Is that sold under a label?

A. Yes.

Q. All cans are labeled are they not?

A. Yes.

Q. Do all cans carry the label of the canner or not?

A. The Federal Food & Drug Law provides that it carry either the packer's or the distributor's name appearing on the label.

Q. Then fruit canned in Florida, if it doesn't have the label of the Florida canner the distributor has to put his label on?

A. Yes.

Q. Do they have certain brands that they use?

A. Yes.

Q. Over a period of time they have advanced and built up good will for those brands, have they?

A. They have.

[fol. 83] Q. What effect will the non-production, or if you are unable to operate, in other words, the rest of this season will there be a shortage of canned grapefruit juice and grapefruit as far as your requirements from the Northern market is concerned?

A. As far as us—we would be short quite a lot.

Q. What will happen to the markets if you are not in position to supply them?

A. We would lose our contact. The distributor has to have his source of supply. If we get in a position where we are unable to have that source of supply for them, they make connections otherwise, and we lose them as our customer.

Q. Also is it not a fact that the competing canned juices would take the place of yours and make an inroad into your business?

A. Yes, sir.

Q. Have you been shut down any this year?

A. Yes, sir.

Q. When was that?

A. Immediately following the effective date of the invoking of the Growers Cost & Guarantee Law.

Q. Did you open up and operate any before the injunction was granted?

A. Yes.

Q. Was that under one of these contracts you refer to as customer contracts?

A. Yes, sir.

Q. Tell the court generally the effect of that; how you operated?

A. The grower would deliver the fruit to our canning plant and we arranged with them whereby they were to pay [fol. 84] us all of the expense of the cost of the materials entering into the canning, and we were to hold the goods

for them until August 1st, and for the custom charge there was to be 3 cents per case paid to our company.

Q. And you canned their fruit for them?

A. We canned the fruit for the growers, yes.

Q. And you continued that until the Supreme Court later rendered this decision in the Eckerson case, did you?

A. That's right.

Cross-examination.

By Judge O. K. Reaves:

Q. Mr. Lindsey, as I understand it, there is grapefruit in abundance in Florida this year.

A. Yes, sir.

Q. And but for this law you and the other canners could have bought fruit at your own price?

A. I wouldn't say that.

Q. Well, you allege in the Bill that the growers are willing to sell it for what they could get.

A. That's right.

Q. Then what they could get would depend upon what you and the others were willing to pay, isn't that it?

A. I would think it would depend on supply and demand.

Q. The supply in Florida is not only great, but it is in Texas also, I believe you say.

A. That's right.

Q. It costs more to produce fruit in Texas, Arizona and California than it does in Florida, doesn't it?

A. I don't know.

[fol. 85] Q. Don't you know that all of those states produce under irrigation and that the cost of production is greater?

A. I wouldn't know whether the cost is greater, because I understand in Texas in some areas they do not have to fertilize, so I am not in a position to know about the cost.

Q. You don't know about that?

A. No.

Q. These cooperatives that you are talking about, do you mean by that stores that are organized under the Florida laws for that purpose?

A. I don't know whether they are organized under the Florida laws or not; it would apply to Cooperatives and Grower Owned.

Q. With reference to the growers is it not a fact that the growers have separate corporations that do the canning?

A. Separate corporations from what?

Q. Well, the so-called growers that you say can their own fruit, is it not a fact that they run their canning plants under separate corporations?

A. I can't answer that. I don't know.

Q. Do you not know, that as a matter of fact that many of them do?

A. I don't know.

Q. You have no knowledge of that?

A. No sir, I never made any investigation as to the setup of the companies, as to the corporations, whether they are interlocked or whether they are all in one, I have no knowledge about that.

Q. You do know that they do business under corporate names, and corporate organizations, do you not?

A. Some do, but I am not sure whether all of them do it [fol. 86] under corporate names.

Q. Isn't it a fact that so far as your knowledge goes, the big growers that run canning plants have separate corporations or have their canning plants incorporated and conduct the canning activities as a corporation?

A. I really don't know.

Q. Let's go back to what you call the Cooperatives. You do know, do you not, that the State of Florida has laws under which farmers can organize and have certain privileges that other corporations do not have. Do you know that?

A. No, I don't.

Q. You are not familiar with that?

A. No.

Q. Well, now, suppose you tell us then what you understand by Cooperatives?

A. A cooperative association?

Q. Yes.

A. My understanding is that that is a group in this particular industry—a group of growers that will go into an organization as an association either for marketing, canning, or for grove care, or all.

Q. And you do not know that when they form such an association they form it under the laws of Florida?

A. I would imagine they do, but I am not a member of them, so I have no direct knowledge.

Q. You are including the Citrus Exchange, are you not? I mean in what you call the Cooperatives?

A. For marketing of fresh fruits.

Q. Well, would you class that as a Cooperative, according to your understanding?

A. I would.

[fol. 87] Q. You know that is incorporated under the laws of Florida, do you not?

A. Yes sir, I assume it is.

Q. You say that you had contracts when this law was put into operation which you were able to get cancelled. At what price had you agreed to sell under those contracts?

A. At 75 cents a dozen for fruit in No. 2 cans.

Q. At what price had you agreed to sell juice?

A. At 55 cents in No. 2 cans.

Q. Now these other canned goods that you say you have to compete with, you have always had to compete with those, have you not?

A. Yes, sir.

Q. And you will continue, of course, to have to do so.

A. I presume so, yes sir.

Q. Is the price of grapefruit, canned grapefruit and grapefruit juice in the market this year materially less than in preceding years?

A. Yes, juice particularly is lower.

Q. How much?

A. Well, I don't recall exactly what the prices have been in the past year, but my remembrance is that this is the lowest quotations of grapefruit juice.

Q. How about the hearts?

A. They are probably lower this year than in the past.

Q. Did you sell hearts last year at 75 cents?

A. No, not that low.

Q. What price were you able to get last year?

A. I remember somewhere between ninety cents and a dollar a dozen for the No. 2 cans.

[fol. 88] Q. What price were you able to get for your juice last year?

A. It would be around seventy cents, I imagine. I am only guessing. I have no figures on that, but usually there is about 20 cents a dozen spread between the sections and the juice in No. 2 cans.

Q. And you say the juice is selling this year at 62½ cents?

A. We haven't been able to find that we could get that for it, no.

Q. Is that the price you testified you would have to get in order to pay the grower 32 cents?

A. Yes sir, around sixty-five.

Q. In reference to these Cooperatives, do you know of your own knowledge how much they are paying the grower?

A. No, sir.

Q. I believe you have already testified that the so-called individual growers you do not know whether they are separate corporations that do their canning?

A. Yes.

Q. In reference to your purchase of fruit——

By the Court:

Q. Do you know whether the Cooperatives take from others than members of their own association?

A. No sir, I know of no instance that they take other than from their own members.

By Mr. Reaves:

Q. In your purchases of fruit for your canning purposes, do you buy well in advance or do you buy from week to week, as you use it?

A. In our operation we buy as we might need it.

Q. Buy as you need it?

[fol. 89] A. Yes.

Q. In other words, the supply is such that you feel sure of being able to get fruit without making contracts in advance?

A. This season.

Q. You buy the fruit in the grove or do you buy it delivered at the packing house or at your plant?

A. We might buy fruit in the grove, but usually it is bought on an arrangement where they will pick it and set it on the roadside; we do not have any crew for picking and loading the fruit in the groves. Does that answer your question?

Q. Yes. Sometimes you buy under a plan whereby the grower delivers it to your plant, do you?

A. Yes, sir.

Q. That, of course, is the fruit in its natural state.

A. Yes.

Q. Then you take the fruit and process it yourself, or can it?

A. Yes.

Q. And then you ship those canns out from time to time as you have sales for them, do you?

A. Yes, sir.

Redirect examination.

By Mr. G. L. Reeves:

Q. Grapefruit is a perishable fruit, is it not?

A. Yes, sir.

Q. A perishable product?

A. Yes.

Q. And if it is going to be canned it has to be canned during the particular time that it is ready to can?

A. Yes, sir.

Q. If you are unable to operate now you couldn't wait [fol. 90] and operate in the summer and fall.

A. That's right.

(Witness excused.)

Thereupon to further maintain the issues on their behalf of plaintiffs produced as a witness one FRED ELDER who being first duly sworn, testified as follows:

Direct examination.

By Mr. G. L. Reeves:

Q. You are Mr. Elder?

A. Yes, sir.

Q. Are you in the canning business?

A. At Bradenton.

Q. Your company a corporation?

A. It is.

Q. And it is one of the plaintiffs in this case, is it?

A. Yes, sir.

Q. Tell the Court, please whether or not prior to this order of January, 1939, you had orders for buying and selling any particular grapefruit?

A. I did.

Q. How much had you under contract?

A. In the way we conduct our business we will sell what is called "futures"; my business is very largely export; the export business is quite largely on futures, so as long as we can get a crop and know about what fruit is going to be worth, we sell quite a considerable quantity of futures.

Q. Had you sold any this year?

A. In the neighborhood of 200,000 cases I have sold.

Q. Prior to January 20th, 1939 had you sold any futures then?

[fol. 91] A. Yes, quite a large quantity—upwards of 100,000.

Q. Prior to that time had you made contracts for purchasing the raw product?

A. Yes, sir.

Q. At what price were your contracts for purchase of raw products?

A. They were 20 cents on the tree for the large and 15 cents on the tree for the small. Now if I may explain, there was an industry conference at Washington in October, which I attended, and it was all figured out by the Agricultural Department that the canners, if they could pay 20 cents per box for the fruit on the tree, it would be of very material assistance to the industry. About a week later the growers met in Florida, and passed a resolution asking the canners to pay 20 cents. I was in sympathy with that. I was in Washington, so consequently I made contracts for approximately 100,000 boxes of fruit at those prices—20 cents on the tree.

Mr. Reaves: We ask that the testimony about the resolution passed somewhere be stricken, because the resolution itself is the best evidence. It is immaterial and irrelevant.

The Court: That is inferential, I think, and I don't see that it would be material——

Q. Except for this regulation of January, 1939, could you have bought what you had contracted for and sold what you had sold and made in excess of $3,000.00?

A. Oh yes.

Q. You would have made far in excess of that, would you?

A. Yes, the contracts were valid; I was making them [fol. 92] right along. I tried to keep as far ahead as I could with the contracts, as we would use the fruit from day to day.

Cross-examination.

By Mr. Pierce:-

Q. I believe you submitted a form of contract to the Commissioner of Agriculture after this regulation of Jany. 19 went into effect, did you not?

A. First I tried to run under the contracts which I had made previous to the declaration of the Act.

Q. Answer my question. Didn't you submit such a contract?

A. No, not a contract of the purchase of fruit, if that's what you mean.

Q. Isn't your firm the Florida Grape Fruit Canners, Inc., from Bradenton?

A. Yes.

Q. Wasn't Mr. Blakey your attorney?

A. Yes.

Q. Didn't he appear at the hearing before Mr. Mayo at Winter Haven at which the legality of your contract was tried out?

A. That's another contract. If we can get the two straightened out, I will answer it.

Q. Wasn't that a contract that you proposed to have with the growers?

A. Yes, but not the one Mr. Reeves has been questioning me about.

Q. Didn't that contract provide for the payment of 32 cents a box payable 12 cents, I believe, cash?

A. 20 cents at the time of the execution of the contract and the balance of 12 cents on January 15th.

[fol. 92] Q. July 15th; next ensuing, if there weren't any suits in court attacking the legality—attacking the law, or something on that order?

A. And if all growers continued to get 32 cents throughout the season.

Q. Your contract didn't provide that.

A. Yes, it did.

Q. Anyway, if those contingencies set forth in your contract, that is, if they came through, then you would have paid 32 cents a box, wouldn't you?

A. Yes, I would — had to.

Q. And did that contract contemplate a profit on your part?

A. No.

Q. I will ask you why, if you would lose money by that contract, why you would kept open?

A. Well, we have a limited capacity. We can gauge production so much a day, and I had contracts, and you can't fool with an Englishman, when you made a contract with him, you are there; and I had to produce these goods regardless of what it cost me. Now I took that out, I put the money in escrow, I took and paid the 20 cents and put the 12 cents in the bank; in order to run that way, why I did it. I wasn't a philanthropist, but it was necessary for me to turn the wheels over every day.

Q. At the time of this hearing before the Commissioner of Agriculture, at which your contract was in question, at that time you had a contract with S. & W. Co., on the Pacific Coast, did you not?

A. Yes.

Q. That's a jobber, I believe, on the Pacific Coast?

A. Yes, and a very large one.

[fol. 94] Q. Didn't that contract provide for the furnishing to that jobber by your company of 100,000 cases?

A. Yes.

Q. And didn't that contract pay you or your company enough to enable you to pay the grower 32 cents a box?

A. I have an explanation of that.

Q. Didn't you state that to the Commissioner, or at least through your attorney make that representation?

A. I wasn't there. I don't know what he said, but I will say this, that I talked to them on the telephone before I made this contract and they said "Well, we must have the goods"—you understand 32 cents is not high price for fruit—"we must have the goods, and we want it packed in January and February when the fruit is at its peak; now we must have, however, competition throughout the summer, and we can't have any cheap grapefruit going on the market, we will pay you your price; we will advance our price and pay you what you have to have to come out even—come out even, mind you, at 32 cents, but if this law which we don't believe in is held unconstitutional for any reason, then we ask you to repay to us the money.

Q. And if the law were upheld then they would pay you enough to break even.

A. Right.

Q. And in that event you wouldn't lose any money, would you?

A. We would not lose any money.

Redirect examination.

By Mr. Reeves:

Q. On that particular contract, you wouldn't lose any money, is that it?

[fol. 95] A. On that particular contract; that is the only one.

Q. Isn't it a fact that the Commissioner of Agriculture suspended your license because you attempted to operate under such a contract as that?

A. They did.

Q. And you had to shut down?

A. I did.

Q. Haven't you always maintained, that the canners, providing all canners and all growers conformed alike—haven't you always maintained that the canners can pay the growers 50 cents a box, and still make money?

A. Yes, if it could be controlled.

Mr. Reeves: The only other witness we have would be merely cumulative.

(Thereupon affidavit of John Maxey, dated the 8th day of April, 1939, is read by Mr. Grimes.)

(Thereupon T. L. Hodson affidavit is read in evidence.)

COLLOQUY

The Court: Do you make any contention that this Citrus Commission did not comply with the Act?

Mr. Reeves: Yes, we do. However, I want to bring out one fact that may help. This Act says they shall have 50% of those who own or control. We only said they didn't have 50% of the owners; we contend the word "control" is indefinite • • •.

(Hubble affidavit read in evidence by Mr. Grimes.)

(R. H. Howard and Charles F. Chastaine affidavits read in evidence.)

The Court: Mr. Bently, what do you want?

Mr. Bentley: I present on behalf of the Florida Citrus Growers, Inc., a corporation under the laws of Florida, [fol. 96] composed of between five and six thousand bona fide citrus growers this petition for intervention in the above styled cause (reading) I will say to your Honors that we will waive the right to any argument on this hearing on a temporary restraining order, but should the matter come to a final hearing at some later date on a permanent injunction we would like to be heard.

Mr. Reeves: I feel we must object to that, on behalf of the plaintiffs, because the Florida Citrus Commission is a party to this suit, and if we let one bunch of growers line up with the defendants we could go and get growers to line up with the plaintiffs, and it would be an endless proposition. We feel they are amply represented by the Commissioner of Agriculture and the Florida Citrus Commission.

Mr. Bentley: This is not an isolated group of growers, but is a growers organization . . .

The Court: I don't see any reason why he shouldn't be in this case. I don't know about the permanent injunction. That will come up and have its day at that time.

The Court: Is there any Statute of Florida which undertakes to protect or secure to the operators of the grapefruit industry, the canners, their expenses?

Mr. Reeves: No, sir.

Mr. Reeves: That is all for the plaintiffs.

(Argument. After argument adjournment is taken until 1:30 P. M.)

At 1:30 P. M. the hearing is resumed, there being present the same appearances.

(J. F. Mays affidavit is read on behalf of the defendants by Mr. Pierce.)

[fol. 97] Mr. Reaves: We submit to the Court that we be given an opportunity to submit testimony to contradict this affidavit introduced after we argued.

The Court: You can put an affidavit in on that.

Mr. Pierce: We would like an opportunity to rebut any affidavits.

The Court: Let them serve notice on you.

Judge Reaves: I suggest we withdraw those side issues.
Mr. Sutton: Then withdraw your affidavits.

(Argument.)

The Court: I don't see how we can pass on the enforcement of the Act unless it is on some constitutional questions * * *. What questions are you relying on?

G. L. Reeves: We are relying on the Commissioner of Agriculture having no authority to do what he is attempting to do.

The Court: I call your attention to the fact that you do not attack the constitutionality on the ground of want of due process.

G. L. Reeves: If there is any doubt in your mind we would like permission to amend.

The Court: There is no question to pass on the constitutionality unless it is challenged. The Interstate Commerce is challenged but the other aspect is not challenged.

G. L. Reeves: If it is not challenged I would like permission to amend the bill. If your Honor will give us two or three days to decide that.

The Court: I don't see why you can't decide on that right now. We can't pass upon the question that has been argued if it isn't in the pleadings.

[fol. 98] (Amendment to Bill of Complaint filed by plaintiffs.)

(Thereupon 5 days are given the plaintiffs to file affidavits and five days given defendants in which to answer.)

(Hearing adjourned.)

In United States District Court

Resolution of the Florida Citrus Commission—Filed April 15, 1939

Whereas, innumerable growers and shippers have appeared before the Citrus Commission and requested that the Growers Cost Guarantee Law be enforced 100 per cent against all handlers, or that the enforcement of the law be discarded, and

Whereas, the general complaint is among growers and shippers, that the law is not being equitably enforced due

to the different set-ups of the different handlers and the different schemes and devices used by canners and handlers generally to evade the law, and

Whereas, the auction sales of Duncan grapefruit indicate that the grower is not receiving cost of production and the F.O.B. sale price of fresh fruit generally indicate that the grower is not receiving cost of production, and it is generally felt that all of the canners are not paying the cost of production, and

Whereas, this leads to an intolerable position of and places a hardship upon those operators living up to the spirit of the law, and

Whereas, the Florida Supreme Court in its recent decision has clearly set forth the meaning of the law, and [fol. 99] Whereas, the Commission again states its position of wishing to back up the action of the Commissioner of Agriculture in this matter to the full extent of its power and ability, now, therefore,

Be it Resolved, that the Florida Citrus Commission hereby requests the Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, to equitably enforce the Growers Cost Guarantee Law 100 per cent upon all handlers, shippers and canners alike, and that they request the said Mr. Mayo to inform them if, in his opinion, there is any reason why this law cannot be enforced 100 per cent upon all handlers alike.

STATE OF FLORIDA,
County of Polk:

I, T. L. Hodson, Assistant Secretary to the Florida Citrus Commission, hereby certify that the foregoing is a full, true and correct copy of a resolution unanimously adopted by the Florida Citrus Commission in meeting assembled at Lakeland, Florida on the 21st day of March, A. D., 1939.

Witness my hand and the seal of the Florida Citrus Commission at Lakeland, Florida, on this the 12th day of April, 1939.

T. L. Hodson, Assistant Secretary, Florida Citrus Commission. (Seal.)

In United States District Court

Affidavit of John A. Snively—Filed April 15, 1939

[fol. 100] Before me the undersigned Notary Public, in and for the State of Florida at Large, personally appeared, John A. Snively, who being first duly sworn, deposes and says: That he is President of Polk Packing Association, a cooperative packing, canning and marketing association, under the laws of the State of Florida; that said Polk Packing Association owns and operates a canning plant, and cans for its members, grapefruit juice; that during the period from January 19th to March 23, 1939, said Polk Packing Association canned for its grower members between 60,000 and 70,000 cases of grapefruit juice; that said Polk Packing Association endeavored to sell said products on the market at a price that would yield its grower members thirty-two cents per box on the tree; that said Association was unable to sell any of said grapefruit juice at a price which would yield the grower thirty-two cents per box, on the tree, and that said products were stored and held until about the 24th day of March, 1939; that prior to the 24th day of March, 1939, other cooperative associations and grower owned canning companies in the State of Florida, quoted a lower price for grapefruit juice than the Polk Packing Association had quoted, and actually sold the same at such lower quotation; that the said Polk Packing Association thereupon sold approximately 50,000 cases of said grapefruit juice, at a price which would yield the grower a [fol. 101] price less than thirty-two cents per box, on the tree.

Deponent further says that the price at which grapefruit juice is selling on the market today, would not yield the grower thirty-two cents per box, on the tree.

Deponent further says that in order to pay the grower thirty-two cents per box for grapefruit on the tree, on the present market, and on the market as it has been for the past several months, the packer would have to take a loss.

Deponent further says that the Polk Packing Association is cooperatively owned and operated, and that if it has to pay the grower thirty-two cents per box for the grapefruit canned by it, and sold at a price which would not yield thirty-two cents per box, then said packing association will

have to take the loss in operation, and that while the grower may receive thirtytwo cents per box for his grapefruit, he will take a loss in the operation of said canning plant of an amount equal to the difference between the market price of said grapefruit and thirty-two cents per box.

Jno. A. Snively.

Sworn to and subscribed before me on this the 14th day of April, A. D. 1939.

Margie D. Spann (Englord), Notary Public, State of Florida at Large. (Seal.)

My Commission Expires Aug. 29, 1939.

[fol. 102] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RALPH POLK, SR.—Filed April 15, 1939

Before me, the undersigned authority, personally appeared Ralph Polk, who being by me first duly sworn, upon oath, deposes and says that he is President of The Polk Company, a corporation organized and existing under the laws of the State of Indiana, and authorized to do business in the State of Florida, which corporation is actively engaged in the business of canning citrus fruit and citrus fruit juices.

Affiant further says that he has been engaged in the canning of citrus fruit and citrus fruit juices in the State of Florida for the past eighteen (18) years.

Affiant further says that he has been shown copy of Affidavit of J. F. Mays filed in this cause on or about the 10th day of April, 1939 and affiant denies that Growers Cost and Guarantee Law from January 19, 1939 to March 23, 1939 [fol. 103] was enforced with respect to all cooperative associations in the State of Florida; affiant further denies that there was only one cooperative canning plant during the period of time above stated and says that, of his own knowledge, he knows that there was more than one cooperative plant operating during said period of time.

With reference to fresh fruit cooperative shippers, this affiant says that he has no actual knowledge as to the enforcement of said law other than that he knows from the auction prices showing the amount that the fresh fruit brought on auction markets in the East, that there was not

a return to the growers of 32¢ per field box on the tree for the fruit sold through said auction markets.

Affiant further says that from his experience in the canning business and his knowledge of the manner in which canning business is carried on in the State of Florida, it is his belief that it is impossible to determine, at this time, whether any canning corporation- in the State of Florida have made any profits in their business this season other than that affiant knows that at the current prices quoted for canned grapefruit and canned grapefruit juice, it is his honest belief that said prices will not return to the growers 32¢ per field box.

[fol. 104] With reference to the provision of the Affidavit of J. F. Mays that several canning corporations in the State of Florida have consistently paid 32¢ per field box and have made a profit in their business, this affiant says that if any canning plant has completed its operations for the season and has sold and disposed of its canned products, it would then be in a position to know whether it had made a profit or a loss during the season. That affiant is informed and believes that none of the independent corporations in the State of Florida have yet completed their season and disposed of their finished products, so that it can be determined whether they have made any profits.

Affiant further says that he knows of his own knowledge that many growers in the State of Florida have delivered their grapefruit to cooperatives, have received net returns for less than 32¢ per box and that the same is satisfactory to said growers and that it is all they expect to receive.

Affiant says that he knows that one or more cooperative canning plants in the State of Florida operated during the period of time from January 19, 1939 until March 23, 1939 and are still operating and have canned large volumes of grapefruit and grapefruit juice; that there are now held and stored by one or more cooperatives large volumes of canned grapefruit and grapefruit juices, for which the grower has not been paid the 32¢ per field box and which canned products are in competition to the products of the plaintiffs in this cause.

Affiant further says that when the Growers Cost Guarantee Law became effective on January 19, 1939, The Polk [fol. 105] Company was forced to cease operation because of its inability to pay to the grower the 32¢ per field box on the tree under the existing market conditions; that The

Polk Company prior to that date had been operating and had been employing 1250 employees with a weekly payroll of approximately $15,000.00; that in order to meet its requirements to its buyers, the said company was forced to purchase canned grapefruit products in the State of Florida and that it did purchase large volumes of the canned grapefruit products from cooperatives and grower owned canning plants at prices which affiant knows was insufficient to return to the grower the said cost of production as fixed by the citrus commission; that affiant knows that a large part of the canned products purchased by The Polk Company during said period of time were actually canned between January 19, 1939 and March 23, 1939 for the reason that some of the cooperative and grower owned canning plants from whom The Polk Company purchased its requirements did not begin the canning of grapefruit products until the independents had been forced to cease operations by reason of said Growers Cost Guarantee Law.

Ralph Polk, Sr.

Sworn to and subscribed before me this 13th day of April A. D., 1939.

Wm. Smith. (Seal)

[fol. 106] IN UNITED STATES DISTRICT COURT

PETITION TO INTERVENE OF FLORIDA CITRUS GROWERS, INC.—Filed April 10, 1939

The Florida Citrus Growers, Inc., a corporation under the laws of Florida, composed of between five and six thousand bona fide citrus growers, present this its petition to intervene in the above styled cause.

The Florida Citrus Growers, Inc., would respectfully show unto the Court:

1. That the growers of grapefruit are the real parties in interest in this litigation and are proper parties in this cause.

2. That the Grower's Cost Guarantee Law attacked in this action was brought into being and its provisions invoked upon the petition of the growers of Florida.

3. That if those who grow grapefruit cannot get back at least the cost of production, one of the basic industries of Florida will be destroyed.

4. That any benefits from said Grower's Cost Guarantee Law will inure to the growers and to strike down said act will cause irreparable injury to this large group of Florida citizens.

Wherefore, Florida Citrus Growers, Inc., petitions this Court for permission to intervene herein as a party defendant with the right to be heard in behalf of the validity [fol. 107] of the law here under attack.

Ed R. Bentley, Attorney for Florida Citrus Growers, Inc.

STIPULATIONS RE TIME FOR FILING DEFENDANTS' PLEADINGS

On April 15, 1939, Stipulation of respective counsel, dated April 11, 1939, giving defendants ten days from that date within which to file pleadings, was filed.

On the 24th day of April, 1939, Stipulation of respective counsel was filed, giving defendants until May 15, 1939, within which to file pleadings.

On the 17th day of May, 1939, Stipulation of respective counsel was filed, giving defendants until May 17, 1939, within which to file pleadings.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION FOR INTERLOCUTORY INJUNCTION—Filed April 28, 1939

This cause coming on to be heard before the undersigned Judges on the Motion for an Interlocutory Injunction, and after hearing the evidence and argument of counsel and for the reasons to be expressed in an opinion to be filed later, It Is Considered, Ordered and Decreed by the Court that the Motion for Interlocutory Injunction be and the same is hereby granted, and the restraining order hereto- [fol. 108] fore issued by the District Judge is continued in

full force and effect until the final hearing in this case or until the further order of the Court.

Done and Ordered, this the 28th day of April, 1939.

Leon McCord, Judge, United States Circuit Court of Appeals. Robert T. Ervin, United States Dis-District Judge. Alexander Akerman, United States District Judge.

IN UNITED STATES DISTRICT COURT

OPINION—Filed May 3, 1939

This case was argued and submitted on April 10th, 1939, on the bill and testimony.

The defendants appeared and though they had not filed answers, argued the case and requested the Court to pass on all questions presented, and especially on the constitutionality of the Act involved.

The Act is found in Florida Acts of 1935, page —.

Grower's Cost Guarantee Law.

An Act relating to citrus fruit: Prescribing conditions and limitations upon the sale, marketing and processing thereof, and the effect of contracts of sale and of marketing and processing agreements.

[fol. 109] Whereas, it is found by the Legislature and hereby declared that the production and distribution of citrus fruit is a paramount industry in Florida upon which the prosperity of the State in a large measure depends; that such fruit and the juices thereof have become and are generally used in great and rapidly increasing quantities, both voluntarily and upon advice of physicians, by people of all classes, ages and conditions; that it is necessary for the reasonable comfort, welfare and health of the people and in order to build up their strength and vigor that an adequate and dependable supply of high grade citrus fruit in the State of Florida is therefore hereby declared to be a business affecting the public health and interest, that unfair, unjust, destructive, demoralizing, and uneconomic trade practices have been and are continuing to be carried on in the sale and distribution of citrus fruit in this state to the extent that such fruit has been and is continuing to sell in many cases at prices below the cost of production

and the constant, dependable and adequate supply of such fruit for sale and consumption is thereby so seriously imperiled as to threaten the break down of the industry; that the present acute economic condition in Florida is in part the consequence of a severe and increasing disparity between the prices of citrus fruit and other commodities; that it is both expedient and necessary to build up the quality and reputation of Florida's citrus fruit in the market and to stabilize the Florida citrus industry and to protect the public and the growers against fraud, deception, and financial loss through further continuation of unscrupulous practices and haphazard methods in connection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

Therefore, in the exercise of the police power of the State, for the purpose of protecting and promoting the public health and general welfare,

. . . . . .

Section 3. The Commissioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitions signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time to time may make, and after the Citrus Commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and [fol. 110] record in permanent form annually the average reasonable cost per standard packed box of producing citrus fruit and every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm, corporation, or association buying, marketing or processing said citrus fruit shall in any event pay

the grower said cost of production, to be ascertained by multiplying the said cost per standard packed box as shown by the record of the Commission current at the time the contract, agreement, plan of arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

We are not concerned with Sections one and two, but the provisions of Section three raise all the questions with which we are concerned.

Taking up these in the order of their importance, we consider whether it violates the due process clause of the Fourteenth Amendment. We are aware of the fact that many of the later decisions on the due process clause have gone far beyond the earlier ones.

The latest authoritative decision in which this question is discussed is West Coast Hotel Co. vs. Parrish, 300 U. S. 491, which says:

"The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguard is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, [fol. 111] morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these

words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described.

But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Chicago B. & Q. R. Co. vs. McGuire, 210 U. S. 549-567.

The definition of due process here given contains two positive requirements. First: the regulation must be as applied to the Citrus business, reasonable. To be reasonable it must not be arbitrary, nor should it be unjust to any of those whom it undertakes to regulate. Second: it must have been adopted in the interests of the community. In other words, the community or the public must have an interest in or be concerned with such regulation.

The protection of the public should be the prime purpose of the regulation and not the business to be regulated.

Take the citrus industry as a whole and it is manifest that it is as much dependent on the canners as upon the growers, for we all know that the fruit in its natural state [fol. 112] cannot be stored for future sale as grain is done, but that the juices when processed and canned can be. So if the crop is raised too large to be sold as gathered, the price of the fruit will be greatly reduced and the loss much greater than if the excess fruit is canned and the juices stored for future sale. The canner who processes the fruit and preserves the juice plays an important part in buying the excess fruit and processing it. The Act recognizes the canners in the reference to "the fruit and the juices thereof", and to processing the same.

The testimony showed that this year's crop is large, and the Citrus Commission fixed the cost to the grower of raising the crop of grapefruit at thirty-two cents a box, and that the canner could not pay that price and the cost of processing it and sell the juice without suffering a loss.

It further showed that the canners had established businesses of years standing with a large investment, employing several thousand employees.

That they had made contracts for sale of juice for future delivery and that they were forced to cancel when the cost price was fixed by the Commission.

The effect of this was that the canners were penalized for the benefit of the growers if the canners continued business.

The testimony also showed that many of the growers had organized cooperative corporations to process their grapefruit, the cooperative did not pay cash for their fruit to these growers, but credited them with the amount of the price of the fruit and were not expected to pay for it unless the market prices enabled them to pay it, and the Commissioner did not enforce payment while requiring payment of the regular canners.

[fol. 113] This certainly was discrimination against the canners, and the Commissioner must have construed the Act so, as to authorize him to do this.

The Act makes a sale for less than the price fixed unlawful. Suppose the price fixed by supply and demand is less than that fixed by the Commission, a sale by a grower for any less price would be unlawful.

If his actual cost of raising his crop were ten thousand dollars, he could not sell it for eight thousand dollars and so minimize his loss, but would be compelled to let it spoil on the trees and so lose the whole crop.

Is not this alone sufficient to make the Act arbitrary and prejudicial? We find the Act unconstitutional.

There is one other feature of the Act which may not render it violative of the Constitution, but certainly requires enjoining the Commissioner from enforcing the fixed price.

The Act provides that after the Citrus Commission shall have procured from producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the annual reasonable cost per standard box, of producing citrus fruit, etc.

There is no proof in the record of any such consent and agreement having been secured by the Commission.

We therefore conclude that the injunction should be granted.

Leon McCord, U. S. Cir. Judge; Robert T. Ervin, Alexander Akerman, Judge.

April 13, 1939.

[fol. 114] IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 17, 1939

Nathan Mayo, as Commissioner of Agriculture of the State of Florida, Defendant herein, and Florida Citrus Commission, a body corporate under the laws of Florida, Intervening Defendant, for joint and several answer to the complaint, say:

First Defense

The complaint fails to state a claim against these defendants or either of them, upon which relief can be granted.

Second Defense

Plaintiffs are not in position to challenge the constitutionality of Chapter 16862, Laws of Florida, Acts of 1935, nor the constitutionality of the resolution of the Florida Citrus Commission promulgated thereunder on January 16, 1939, for the reason that plaintiffs and all other independent canners of citrus fruits and citrus juices are affected alike by said Act and by said resolution, and are not discriminated against.

Third Defense

Chapter 16862, Laws of Florida, Acts of 1935, as well as the resolution of the Florida Citrus Commission promul- [fol. 115] gated pursuant thereto, contemplates and requires by its terms a uniform enforcement thereof as to all handlers of citrus fruit, and therefore if there is any variation in the manner of enforcement of said Act as between plaintiffs and the so-called cooperative organizations, such fact cannot be made the basis of a claim of unconstitutionality of the statute, because to the extent of the enforcement or lack thereof as against the so-called cooperatives, the en-

forcement officials would be acting in their private capacity, and not as public officials in the enforcement of the Act.

Fourth Defense

Defendants admit the allegations contained in paragraphs I, II, XIII (erroneously designated as paragraph XXII in the complaint), XIV, and XV of the complaint. Defendants admit the allegations of paragraph IV of the complaint to the effect that the canning of grapefruit and grapefruit juice has developed into one of the principal industries of the State of Florida, and that other citrus juices are also canned in said State, but are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the remainder of said paragraph of the complaint. Defendants admit the allegations of paragraph V of the complaint to the effect that canned grapefruit and grapefruit juice packed in the State of Florida are widely distributed in interstate commerce, but are without knowledge or information sufficient [fol. 116] to form a belief as to the truth of the remaining allegations of said paragraph. Defendants admit the allegations of paragraph VII of the complaint to the effect that grapefruit is produced in the State of Texas and the territory of Puerto Rico, but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph of the complaint. Defendants admit the allegations of Paragraph XII of the complaint to the effect that the Commissioner of Agriculture of Florida has warned plaintiffs that if they operate their canning plants and do not pay the producer at least 32¢ per field box for grapefruit, the licenses of plaintiffs will be revoked, but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph of the complaint. Defendants admit the allegations contained in paragraph XVI of the complaint, except that defendants deny that the Florida Citrus Commission did not comply with the statute as alleged in said paragraph, as to which defendants aver the truth to be that said Commission did comply with the statute in the respect mentioned. Defendants admit the allegations contained in paragraph XVII of the complaint, except that defendants deny that the Florida Citrus Commission failed to comply with

the provisions of the statute as alleged in said paragraph, as to which these defendants aver the truth to be that said Commission did comply with the statute in the respect mentioned. Defendants admit the allegations contained in paragraph XVIII of the complaint, except that defendants [fol. 117] deny that the Florida Citrus Commission had no power, authority, or jurisdiction to issue the said regulation, as alleged in said paragraph, and defendants aver, in further support of this denial, the fact to be and that the Florida Citrus Commission so found, that all citrus fruit dealers handling grapefruit grown in the State of Florida are subject to the provisions of said Act. Defendants admit the allegations contained in paragraph XX of the complaint, but aver in addition thereto that said contract therein mentioned did not guarantee to the growers at least 32¢ per field box for grapefruit, nor in fact guarantee to the growers any amount therefor, and that the Supreme Court of Florida so found and held. Defendants admit the allegations contained in paragraph XXIII of the complaint, except that defendants deny that the Commissioner of Agriculture of Florida is without authority to revoke the licenses of plaintiffs or any of them for their failure to comply with the provisions of the Growers' Cost Guarantee Act or the regulation promulgated thereunder, and deny that such revocation will be illegal, improper, and without authority. Defendants admit the allegations of paragraph XXIV of the complaint, except that defendants deny that such revocation of licenses of plaintiffs or any of them will be depriving such plaintiffs of their property without due process of law, or will take away from such plaintiffs their right to transact lawful business in the State of Florida, or that the loss and damage of such plaintiffs will be irreparable. Defendants are without knowledge or information sufficient to form a belief as to the truth of [fol. 118] the allegations contained in paragraph III, IV-A, VI, VIII, and XI of the complaint. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IX of the complaint, except that defendants deny that because of the statute and regulation mentioned therein, it has been impossible for plaintiffs to operate their factories and pay the grower the sum of 32¢ per field box for grapefruit. Defendants are without knowledge or information

sufficient to form a belief as to the truth of the allegations contained in paragraph X of the complaint, except that defendants deny that unless injunction is granted as prayed for, plaintiffs will be unable to operate their canning factories the remaining portion of this season, and that the loss to each of said plaintiffs will exceed the sum of Three Thousand ($3000.00) Dollars, as alleged therein. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XX-A of the complaint, except that defendants deny that the enforcement of said Act will impose a burden on or directly interfere with interstate commerce, or that if said law and the regulation thereunder are held valid, the plaintiffs will be unable to operate their canning plants, and deny that the effect of said Act will be to attempt to fix the sale prices of grapefruit and grapefruit juice canned in the State of Florida. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XXV of the complaint, except that defendants deny that, because [fol. 119] of the promulgation of the regulation, Florida Grapefruit Canning Company has been unable to accept the said 60,000 boxes of grapefruit at the price set forth in said contract, or that said plaintiff is unable to pay 32¢ per field box for said grapefruit, and process the same and sell it to the consumer under its contract to the consumer. Defendants deny each and every other allegation contained in the complaint. Defendants deny each and every of the allegations contained in the amendment to the complaint made and filed by the plaintiffs, by leave of court, on April 10, 1939. Defendants further answering say that the Commissioner of Agriculture has at all times been of the opinion and has contended that said Act and the resolution of the Citrus Commission promulgated thereunder, apply to all canners and handlers, of grapefruit, who buy, market, or process said grapefruit for or from the producer, whether such canner or handler is an individual or a corporation or a cooperative association, and has endeavored to enforce said Act and said resolution in conformity therewith.

Signed George Couper Gibbs, Attorney General of Florida, Address: State Capitol, Tallahassee, Florida. Signed: H. E. Carter, Assistant Attorney

General of Florida, Address: State Capitol, Tallahassee, Florida. Signed Wm. C. Pierce, Address: 404½ Zack Street, Tampa, Florida. Signed: O. [fol. 120] K. Reaves, Mabry, Reaves, Carlton & White, By O. K. Reaves, Address: First National Bank Building, Tampa, Florida, Attorneys for Defendant, Nathan Mayo, as Commissioner of Agriculture of the State of Florida. Signed E. Glenn Grimes, Address: Bradenton, Florida, Attorney for Defendant, Florida Citrus Commission, a Body Corporate.

Acceptance of Service

I hereby accept service of copy of the foregoing Answer on behalf of plaintiffs on this 15th day of May, A. D. 1939.

Signed: G. L. Reeves, Address: Stovall Professional Building, Tampa, Florida, Attorney for Plaintiffs.

In United States District Court

Petition of Florida Citrus Commission for Leave to Intervene—Filed May 17, 1939

[fol. 121] The Florida Citrus Commission, a corporate body created by and under Chapter 16854, Laws of Florida, Acts of 1935, as amended by Chapter 17775, Laws of Florida, Acts of 1937, whose principal office is Lakeland, Florida, petitions this Honorable Court to intervene in the above entitled cause as party defendant, upon the grounds that it is a proper party defendant herein.

The Act known as Chapter 16862, Laws of Florida, Acts of 1935, questioned in the Bill of Complaint herein, is one of a series of acts passed for the regulation of the citrus industry in Florida, and under which the Florida Citrus Commission has certain duties to perform, namely, fixing the cost of production, the proper exercise of which has been questioned by the complainant in its Bill of Complaint.

Under the series of citrus laws in Florida now in question, the rule and regulation making power is in the Florida Citrus Commission and these rules and regulations have

been directly challenged by the plaintiffs in their Bill of Complaint.

Wherefore, it appears necessary for the Florida Citrus Commission to defend same.

Wherefore, your petitioner prays that it may be made a party defendant to this cause.

Florida Citrus Commission, By E. Glenn Grimes, Attorney, Bradenton, Florida.

[fol. 122] IN UNITED STATES DISTRICT COURT

ORDER GRANTING PETITION OF FLORIDA CITRUS COMMISSION TO INTERVENE—Filed May 17, 1939

The petition of the Florida Citrus Commission to be made a party defendant in this action, having come on this day to be heard and the Court being advised in the premises,

It is Hereby Ordered, Adjudged and Decreed that the Florida Citrus Commission be joined as party defendant in the above entitled cause.

Done and Ordered in Chambers at Orlando, Florida, this the 28th day of March, A. D. 1939.

Alexander Akerman, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 7, 1939

Come now Nathan Mayo, as Commissioner of Agriculture of the State of Florida, and Florida Citrus Commission, a [fol. 123] body corporate, defendants herein, and state that on the 28th day of April, 1939, motion of plaintiffs for an interlocutory injunction was granted, and by opinion dated April 13, 1939 and filed with the Clerk of this Court on May 3, 1939 the statute involved in this cause, towit, Chapter 16,862, Laws of Florida, Acts of 1935, and the resolution of the Florida Citrus Commission promulgated thereunder, were declared invalid and unconstitutional, and the defendants feeling aggrieved at said ruling of said District Court in granting said interlocutory injunction and declaring said State law and said resolution unconstitutional, pray that they may be allowed to appeal to the Supreme Court of the United States for a reversal of said order, and that a transcript of the record in this cause, duly authenticated,

may be sent to the said Supreme Court of the United States.

Petitioners, upon the presentation of this petition, respectfully present a separate typewritten statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the order and judgment in question, which statement also includes a showing of the matters in which it is claimed that this Court has abused its discretion in granting the interlocutory injunction. This petition is also accompanied by an assignment of errors setting out separately and particularly each error asserted.

George Couper Gibbs, Attorney General of Florida;
H. E. Carter, Asst. Attorney General of Florida;
Wm. C. Pierce, O. K. Reaves, E. Glenn Grimes, Attorneys for Defendants.

Presented July 3rd, 1939.

Alexander Akerman, Judge.

[fol. 124] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 7, 1939

Come now Nathan Mayo, as Commissioner of Agriculture of the State of Florida, and Florida Citrus Commission, a body corporate, defendants herein, and aver that in the record, proceedings and order herein there is manifest error, and against the just rights of these defendants in this, to wit:

1. That the Court committed reversible error against defendants in granting the motion of plaintiffs herein for an interlocutory injunction.

2. That the Court committed reversible error against these defendants in holding and adjudging unconstitutional and invalid, Chapter 16,862, Laws of Florida, Acts of 1935.

3. The Court committed reversible error against these defendants in holding and adjudging Section 3 of Chapter 16,862, Laws of Florida, Acts of 1935, unconstitutional and invalid.

4. That the Court committed reversible error against these defendants in holding and adjudging unconstitutional

and invalid the resolution and order of the Florida Citrus Commission dated January 16, A. D. 1939, promulgated pursuant to Chapter 16,862, Laws of Florida, Acts of 1935.

[fol. 125] 5. That the Court committed reversible error against these defendants in holding and adjudging that said Chapter 16,862, and particularly Section 3 thereof, violates the due process clause of the Federal Constitution.

6. That the Court committed reversible error against these defendants in holding that said Chapter 16,862 was arbitrary and unreasonable under the Federal Constitution.

7. That the Court committed reversible error against these defendants in holding that said Chapter 16,862 was discriminatory as against plaintiffs under the Federal Constitution.

8. That the Court committed reversible error against these defendants in finding and adjudging that the Commissioner of Agriculture of Florida must have construed the Act involved herein so as to authorize him to discriminate against the plaintiffs in violation of the Federal Constitution.

9. That the Court committed reversible error against these defendants in impliedly holding and adjudging that plaintiffs had shown the requisite jurisdictional amount of $3,000.00, exclusive of interest and costs, to be involved in this cause.

10. The Court committed reversible error against these defendants in finding as a fact that the cooperative corporations did not pay cash for their fruit to the growers, but credited the grower with the amount of the price of the fruit and that the cooperatives were not expected to pay for the fruit unless the market prices enabled them to pay it.

11. That the Court committed reversible error in finding as a fact from the evidence that the Commissioner of Agri-[fol. 126] culture of Florida did not enforce payment by the cooperative corporations to the growers for their fruit, but did require payment by the plaintiffs to their growers for their fruit.

12. That the Court committed reversible error in holding that the effect of said Chapter 16,862 and the resolution of the Florida Citrus Commission promulgated thereunder,

was that plaintiffs were penalized for the benefit of the growers if plaintiffs continued business.

13. That the Court committed reversible error in finding as a fact from the testimony that the citrus industry as a whole was as much dependent on the canners as upon the growers.

14. That the Court committed reversible error in finding as a fact from the testimony that plaintiffs had made contracts for the sale of juice for future delivery which they were forced to cancel when the cost price was fixed by the Commission.

15. That the Court committed reversible error in holding and adjudging said Chapter 16,862, arbitrary, prejudicial and unconstitutional because of a supposed hypothetical loss to the grower of citrus fruits not based upon any testimony, when this case was brought and heard solely at the instance of citrus canners and not at the instance of any grower.

16. That the Court committed reversible error in finding that the Florida Citrus Commission did not comply with the provisions of said Chapter 16,862 in procuring from producers, shippers or handlers of citrus fruit, not subject to the provisions of the Act, binding agreements to con- [fol. 127] form thereto and abide by its terms, prior to the fixing of the annual cost of production.

17. That the Court committed reversible error in holding and adjudging that the interlocutory injunction must be granted because of the absence of proof that the Florida Citrus Commission had complied with said Chapter 16,862 in procuring from producers, shippers or handlers of citrus fruit not subject to the provisions of the Act, binding agreements to conform thereto and abide by its terms, thus and thereby holding as a matter of law that the burden was upon those who enforce the law to show that the provisions of the Act had been complied with, rather than the burden being upon those who complain of the law, to show that such provisions had not been complied with.

18. That the Court committed reversible error in impliedly holding and adjudging that plaintiffs were in a position to challenge the constitutionality of said Chapter 16,862, and the constitutionality of the resolution of the Flor-

ida Citrus Commission promulgated thereunder, although it appeared by the record before the Court that all independent canners of citrus fruits and others similarly situated as plaintiffs were treated alike in the Act and that the same was enforced equally as between plaintiffs and others similarly situated.

Wherefore said defendants named above, respectfully pray the Supreme Court of the United States that the judgment or order granting the motion for interlocutory injunction may be reversed.

George Couper Gibbs, Attorney General of Florida; H. E. Carter, Asst. Attorney General of Florida; [fols. 128-209] Wm. C. Pierce, O. K. Reaves, E. Glenn Grimes, Attorneys for Defendants.

Presented July 3rd 1939. Alexander Akerman, Judge.

[fol. 210] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed July 7, 1939

This cause coming on this day before the Court on the petition of Nathan Mayo as Commissioner of Agriculture [fols. 211-212] of the State of Florida, and Florida Citrus Commission, a body corporate, defendants in the above entitled cause, praying an appeal to the Supreme Court of the United States for a reversal of the order and judgment herein granting the motion for interlocutory injunction, and that duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said motion, together with defendants' statement particularly disclosing the basis upon which it is contended that said Supreme Court has jurisdiction upon appeal to review the judgment and order in question, together with a showing of the matters in which it is claimed that this Court has abused its discretion in granting the interlocutory injunction; it is therefore by the Court

Ordered and Adjudged that defendants herein, Nathan Mayo, as Commissioner of Agriculture of the State of Florida, and Florida Citrus Commission, a body corporate, be and they are hereby allowed an appeal from the judgment

and order of this Court granting the motion for interlocutory injunction, and that a duly certified copy of the record of said cause be transmitted to the Clerk of the Supreme Court so that he shall have the same in said Court within thirty days of this date. It is further

Ordered that security for costs on appeal be fixed in the sum of $250.00.

This the 3rd day of July, A. D. 1939.

Alexander Akerman, District Judge.

[fols. 213-218] BOND ON APPEAL

On the 7th day of July, 1939, Cost Bond on appeal in the amount of $1,250.00 was presented and approved as required by law and filed with the Clerk.

CITATION

On the 3rd day of July, 1939, Citation was signed and issued by Honorable Alexander Akerman, District Judge, which original Citation accompanies this transcript of record and is submitted to the Clerk of the United States Supreme Court.

[fol. 219] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed July 7, 1939

To the Clerk of the Above Stated District Court:

You will please prepare and certify the transcript of record in the above entitled cause, for the use of the Supreme Court of the United States, pursuant to the appeal heretofore allowed in this case, and observe in preparation of same the following directions:

1. Copy the complaint and exhibits attached thereto, filed March 23, 1939.

2. Copy the temporary restraining order filed March 23, 1939.

3. Recite the filing and approval of injunction bond, filed March 24, 1939.

4. Copy the notice of application for temporary injunction, filed April 10, 1939.

5. Copy the order designating hearing on application for temporary injunction, filed April 10, 1939.

6. Copy the amendment to complaint filed April 10, 1939.

7. Copy certificate of Chas. F. Chastain and exhibits attached thereto, filed April 10, 1939.

[fol. 220] 8. Copy affidavit of J. F. Mays, filed April 10, 1939.

9. Copy additional affidavit of Chas. Chastain filed April 10, 1939.

10. Copy affidavit of John Maxcy, filed April 10, 1939.

11. Copy affidavit of T. L. Hodson, filed April 10, 1939.

12. Copy affidavit of W. W. Hubbell, filed April 10, 1939.

13. Copy affidavit of R. H. Howard, filed April 10, 1939.

14. Copy report of testimony taken April 10, 1939, before 3 Judge Court, filed July 7, 1939.

15. Copy the resolution of Florida Citrus Commission, copy of which was filed April 15, 1939.

16. Copy the affidavit of John A. Snively, filed April 15, 1939.

17. Copy affidavit of Ralph Polk, Sr., filed April 15, 1939.

18. Copy the petition to intervene of Florida Citrus Growers, Inc., filed April 10, 1939.

19. Recite Stipulation of Counsel giving defendants ten days from April 15, 1939, to file pleadings, filed April 15, 1939.

20. Recite Stipulation of Counsel giving defendants until May 15, 1939, to file pleadings, filed April 24, 1939.

21. Recite Stipulation of Counsel allowing defendants until May 17, 1939 to file pleadings, filed May 17, 1939.

[fol. 221] 22. Copy the order granting motion for interlocutory injunction filed April 28, 1939.

23. Copy opinion of three-Judge Court filed May 3, 1939.

24. Copy the Answer of defendants filed May 17, 1939.

25. Copy Petition of Florida Citrus Commission for leave to intervene, filed May 17, 1939.

26. Copy the Order granting leave to intervene to Florida Citrus Commission, signed March 28, 1939, but filed May 17, 1939.

27. Copy the petition for allowance of appeal filed July 7, 1939.

28. Copy the Assignment of Errors filed July 7, 1939.

29. Copy the Statement sustaining jurisdiction, filed July 7, 1939.

30. Copy the Order allowing appeal signed July 3, 1939, but filed July 7, 1939.

31. Recite filing of Cost Bond and approval thereof as required by law, filed July 7, 1939.

32. Recite the issuance of citation on July 3, 1939, and notation that the same accompanies transcript of record.

33. Copy notice and acknowledgment of service on plaintiffs' counsel of all appeal papers, filed July 7, 1939.

34. If plaintiffs, or any of them, under Paragraph 3, of Rule 12, of the Supreme Court rules, should file a typewritten statement or statements disclosing any matter or ground making against the jurisdiction of the Supreme [fols. 222-223] Court, you will please copy the same.

35. If plaintiffs, or any of them, file with you a praecipe indicating additional portions of the record desired to be included or recited, you will please observe and follow the directions contained therein in the making up of said transcript, and you will also please copy such praecipe.

36. Copy this praecipe for making up the record.

37. Attach to said Transcript of Record your certificate.

Wm. C. Pierce, Of Counsel for Defendants.

This is to acknowledge receipt of copy of the foregoing praecipe and acceptance of service thereof on this 7th day of July, 1939.

G. L. Reeves, Of Counsel for Plaintiffs.

Clerk's certificate to foregoing transcript omitted in printing.

[fols. 224-225] Citation, in usual form, showing service on G. L. Reeves, omitted in printing.

[fol. 226] In Supreme Court of the United States

Statement of Points to Be Relied Upon and Designation as to Printing Record—Filed Aug. 7, 1939

Pursuant to Rule 13, Paragraph 9 of the Supreme Court rules as amended, the Appellants state that they intend to rely on all the points set out in their Assignment of Errors.

The Appellants deem the entire record, as filed in the above entitled cause, necessary for the consideration of the cause and of the points relied upon.

George Couper Gibbs, Attorney General of Florida;
H. E. Carter, Asst. Attorney General of Florida;
[fol. 227] Wm. C. Pierce, O. K. Reaves, E. Glenn Grimes, Counsel for Appellants.

On behalf of Appellees I herewith acknowledge service and copy of the foregoing statement and designation, on this 26th day of July, 1939.

G. L. Reeves, Of Counsel for Appellees.

[fol. 228] [File endorsement omitted.]

Endorsed on cover: File No. 43,677. S. Florida, D. C. U. S. Term No. 270. Nathan Mayo, as Commissioner of Agriculture of the State of Florida, et al., Appellants, vs. Lakeland Highlands Canning Co., Inc., The Polk Company and Roberts Brothers, Inc., et al. Filed August 7, 1939. Term No. 270, O. T., 1939.

FILE COPY

Office Supreme Court, U. S.
AUG 7 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 270

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

LAKELAND HIGHLANDS CANNING CO., INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

STATEMENT AS TO JURISDICTION.

GEORGE COUPER GIBBS,
Attorney General of Florida,
H. E. CARTER,
Assistant Attorney General of Florida,
WM. C. PIERCE,
O. K. REAVES,
E. GLENN GRIMES,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 270

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

LAKELAND HIGHLANDS CANNING CO., INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Nathan Mayo, as Commissioner of Agriculture of the State of Florida, and Florida Citrus Commission, a body corporate, defendants herein, herewith submit their statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon the appeal in

this cause, together with a showing of the matters in which it is claimed that the District Court has abused its discretion in granting the interlocutory injunction.

A—Statutory Provisions Sustaining Jurisdiction.

The statutory provision sustaining the jurisdiction of the Supreme Court to review the judgment or order appealed from is conferred by the Act of March 4, 1913 (c. 160, 37 Stat. 1013) as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938); Judicial Code, Section 266; Title 28, Section 380, U. S. Code. Such statutory provision allows an appeal to be taken directly to the Supreme Court of the United States from an order granting an interlocutory injunction in a case involving the constitutionality of a State statute before a District Court of three judges. See also Rule 72 of the rules of civil procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, Ch. 651.

B—Statute of the State, the Validity of Which is Involved.

The statute of the State of Florida involved in this case, and which was declared unconstitutional and invalid by the three-judge District Court upon hearing of plaintiffs' motion for interlocutory injunction, but which defendants herein contend is valid and constitutional, is Chapter 16,862, Laws of Florida, Acts of 1935, shown on pages 268 to 270 in volume 1, of the Laws of Florida, regular session 1935. The Act is as follows:

> An Act Relating to Citrus Fruit: Prescribing Conditions and Limitations Upon the Sale, Marketing and Processing Thereof, and the Effect of Contracts of Sale and of Marketing and Processing Agreements.

WHEREAS, it is found by the Legislature and hereby declared that the production and distribution of citrus fruit is a paramount industry in Florida upon which the prosperity of the State in a large measure depends; that such fruit and the juices thereof have become and are generally used in great and rapidly increasing quantities, both voluntarily and upon advice of physicians, by people of all classes, ages and conditions; that it is necessary for the reasonable comfort, welfare and health of the people and in order to build up their strength and vigor that an adequate and dependable supply of high grade citrus fruit be constantly available, and the production, transportation, processing, distribution and sale of citrus fruit in the State of Florida is therefore hereby declared to be a business affecting the public health and interest, that unfair, unjust, destructive, demoralizing, and uneconomic trade practices have been and are continuing to be carried on in the sale and distribution of citrus fruit in this State to the extent that such fruit has been and is continuing to sell in many cases at prices below the cost of production and the constant, dependable and adequate supply of such fruit for sale and consumption is thereby so seriously imperiled as to threaten the break down of the industry; that the present acute economic condition in Florida is in part the consequence of a severe and increasing disparity between the prices of citrus fruit and other commodities; that it is both expedient and necessary to build up the quality and reputation of Florida's citrus fruit in the market and to stabilize the Florida citrus industry and to protect the public and the growers against fraud, deception and financial loss through further continuation of unscrupulous practices and haphazard methods in connection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

THEREFORE, in the exercise of the police power of the State, for the purpose of protecting and promoting the public health and general welfare,

Be It Enacted by the Legislature of the State of Florida:

SECTION 1. This Act shall be known and called the Growers Cost Guarantee Act.

SECTION 2. The term "Citrus Fruit" as used herein means and includes only the fruits Citrus Grandis, Osbeck, commonly called grapefruit, and Citrus Sinensis, Osbeck, commonly called oranges, and Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

The term "standard packed box" means 1-3/5 bushels whether in bulk or in a container.

SECTION 3. The Commissioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitions signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time to time may make, and after the Citrus Commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the average reasonable cost per standard packed box of producing citrus fruit and every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm, corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production, to be ascertained by multiplying the said cost per standard

packed box as shown by the record of the Commission current at the time the contract, agreement, plan of arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

SECTION 4. The provisions of this Act shall apply to any one or more of the citrus varieties embraced hereunder as may be determined by the petitions and agreements provided for in the foregoing section.

SECTION 5. This Act shall become effective immediately upon becoming a law.

Approved June 8, 1935.
Filed in Office Secretary of State June 8, 1935.

The resolution or order adopted by the Florida Citrus Commission on January 16, 1939, pursuant to the above State law, to become effective January 20, 1939, the validity of which is involved herein along with said State law, is as follows:

Resolution and Order.

WHEREAS, Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, by and with the consent and advice of Honorable Fred P. Cone, Governor of the State of Florida, has by proclamation dated the 13th day of January, A. D. 1939, declared the existence of a State emergency in the Citrus industry, under authority of Chapter 16862, Laws of Florida,

Acts of 1935, known as the Grower's Cost Guarantee Law; and

WHEREAS, petitions signed by persons, firms, corporations and associations, which this Commission finds own or control 50% or more of the producing acreage of citrus fruit and 50% or more of the producing acreage of grapefruit in the State of Florida, have been presented requesting the Florida Citrus Commission to determine and record in permanent form the average reasonable cost per standard packed box of producing grapefruit; and

WHEREAS, the Florida Citrus Commission has determined that all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said act; and,

WHEREAS, the Florida Citrus Commission, based upon said proclamation of the Commissioner of Agriculture and the Governor of Florida, and upon said petitions, having proceeded as authorized and required by said Chapter 16862, Laws of Florida, Acts of 1935, hereby determines and records in permanent form the average reasonable cost per standard packed box of producing grapefruit to be thirty-two (32¢) cents for the citrus fruit season 1938-39;

NOW, THEREFORE, the Florida Citrus Commission does hereby find, determine and order that the average reasonable cost per standard packed box of producing grapefruit is thirty-two (32¢) cents and that said price be recorded in permanent form for the season 1938-39 and that every contract, agreement, plan or arrangement with the grower by or under which his grapefruit shall be bought, marketed or processed shall be held to require that the person, firm, corporation or association buying, marketing or processing said grapefruit shall in any event pay the grower said cost of production as herein ordered and as provided in Chapter 16862, Laws of Florida, Acts of 1935.

The foregoing resolution and order are unanimously adopted and promulgated by the Florida Citrus Com-

mission in open meeting duly assembled in Lakeland, Florida, on this the 16th day of January, A. D., 1939, and shall become effective at 12:01 a. m. Friday, January 20th, A. D., 1939.

FLORIDA CITRUS COMMISSION.
By JOHN MAXCY,
Chairman.

Attest: Chas. F. Chastain, Secretary. (Seal.)

C—Dates of Order Appealed From and Presentation of Appeal Application.

The date of the judgment or order sought to be reviewed, is April 28, 1939. The application for appeal is presented on the 3rd day of July, 1939.

D—Nature of the Case and of the Rulings of the District Court.

On March 23, 1939, complaint was filed in the United States District Court for the Southern District of Florida, by plaintiffs herein (appellees in the Supreme Court) against Nathan Mayo, as Commissioner of Agriculture of the State of Florida, defendant herein (appellant in the Supreme Court), praying that Chapter 16,862, Laws of Florida, Acts of 1935, and the resolution or order of the Florida Citrus Commission of January 16, 1939, promulgated thereunder, be declared invalid and unconstitutional and that said Commissioner of Agriculture be enjoined and restrained from enforcing or attempting to enforce the provisions of said State law. Temporary restraining order was prayed, as was also interlocutory injunction upon convening of a statutory three-Judge Court, and it was also prayed that permanent injunction issue upon final hearing. On March 28, 1939, by order of the District Judge, the Florida Citrus Commission, a corporate body created by and under

the laws of Florida, was permitted to intervene as party defendant upon petition filed by said Commission for that purpose.

On *ex parte* application of plaintiffs, temporary restraining order was entered on March 23, 1939, by the District Judge. A statutory District Court of three Judges, under Title 28, Section 380, U. S. Code, was convened at Orlando, Florida, on April 10, 1939, to hear and consider the application of plaintiffs for an interlocutory injunction. The Court consisted of Honorable Leon McCord, Judge of the United States Circuit Court of Appeals for the Fifth Circuit, Honorable Robert T. Ervin, United States District Judge, and Honorable Alexander Akerman, United States District Judge, the latter being the resident Judge of the district wherein the suit was filed. During the course of the three-Judge hearing, plaintiffs asked and were granted leave to amend their complaint theretofore filed, by adding thereto a paragraph setting forth as a further ground of alleged unconstitutionality of the State law involved, the contention that said law impairs the obligation of contract and the right to freedom of contract.

At the time of the three-Judge hearing, no pleadings had been filed on behalf of the defendant Commissioner of Agriculture or the Florida Citrus Commission, intervening defendant. At the hearing the Court permitted plaintiffs to introduce certain oral sworn testimony and also allowed introduction of certain documentary evidence, including affidavits, presented by counsel for the respective parties.

On April 28, 1939, order was entered signed by all three Judges, granting the motion for interlocutory injunction. The order stated that said interlocutory injunction was granted "for the reasons to be expressed in an opinion to be filed later". Thereafter, on May 3, 1939, opinion likewise signed by all three Judges was filed in the cause holding the State law involved and the resolution of the Florida

Citrus Commission promulgated thereunder unconstitutional and invalid. This opinion, although not filed until May 3, 1939, was dated April 13, 1939, three days after the three-Judge Court hearing.

No findings of fact or conclusions of law were entered or filed, except such as were contained in the opinion filed May 3, 1939. The Court held the State law to violate the due process clause of the Fourteenth Amendment, to be discriminatory as against plaintiffs and thereby to violate the equal protection clause of the Constitution, and to be arbitrary and "prejudicial" as against the growers and producers of such citrus fruits in violation of the Constitution. The opinion further held that there was "no proof in the record" that the Florida Citrus Commission had complied with certain statutory prerequisites before adopting and putting into effect the order promulgated pursuant to the State law involved.

Without making specific findings of fact, the opinion called attention to certain facts "which the testimony showed". Among these were that the current year's crop was large in Florida, that the Florida Citrus Commission had fixed the cost of production under the State law at 32¢ per standard packed box, that plaintiffs, as canners of such citrus products, could not pay such price and the cost of processing and sell the processed product without suffering a loss, that such canners had established businesses of long standing with a large investment and employing several thousand persons, that they had been forced to cancel previously made contracts for the sale of citrus juice for future delivery because of the cost price fixed by the Commission, and that because thereof "the canners were penalized for the benefit of the growers if the canners continued business" Other facts which the opinion says the "testimony showed", were that many citrus growers had organized cooperative corporations to process their grapefruit, which

cooperatives did not pay cash for their fruit to these growers, "but credited them with the amount of the price of the fruit and were not expected to pay for it unless the market prices enabled them to pay it, and the Commissioner did not enforce payment while requiring payment of the regular canners." This was held to be a discrimination against the canners (presumably the plaintiff canners), and it was said that "the Commissioner must have construed the Act so as to authorize him to do this". A hypothetical case was argued in the opinion, not supported by any testimony, urging that a citrus grower who had spent $10,000 in raising his crop might be able to sell his crop for $8,000 and thereby "minimize his loss", but under the State law and the resolution of the Commission such grower could not move his fruit and "would be compelled to let it spoil on the trees and so lose the whole crop." The opinion poses the question whether these supposed facts were not "alone sufficient to make the Act arbitrary and prejudicial" and concludes that the Act was unconstitutional. No growers were parties to the suit, but all plaintiffs were independent canners of citrus products. The opinion closed with the observation that there was "no proof in the record" that the Florida Citrus Commission had procured from certain handlers of citrus fruits, not subject to the law, binding agreements to conform thereto, which under the law it was the duty of the Commission to procure before fixing the cost of production. This apparently imposed upon the State enforcement officers the burden of sustaining the constitutionality of the law and of the resolution, rather than upon those challenging the State law to establish invalidity.

From the foregoing recitals it clearly appears that the nature of the case and of the rulings of the three-Judge District Court was such as to bring the case within the jurisdictional provisions relied on, and that the questions involved are substantial and that the Court abused its dis-

cretion in granting the interlocutory injunction and peremptorily striking down as unconstitutional the State law challenged and the resolution of the Commission thereunder.

The action of the District Court in proceeding to pass judgment on the constitutional questions at the interlocutory hearing was unique and somewhat spectacular. The opinion states that "The defendants appeared and though they had not filed answers, argued the case and requested the Court to pass on all questions presented, and especially on the constitutionality of the Act involved." Counsel for defendants are not in position, even if so inclined, to argue with the District Court as to the scope of the hearing. But it is submitted that even though such request was made, the request would extend only to a bare examination of the statute as to its constitutionality *vel non*. It could hardly be said to embrace a consideration or final determination of the factual situation. Indeed the Court must have so understood, because at the time the opinion was written, all of the evidence and affidavits, brief in character as it necessarily was, was not before the Court nor had even been presented or known to, or considered by, the Court. At the three-Judge interlocutory hearing on April 10th the Court at the request of plaintiffs' counsel granted plaintiffs until and including April 15th within which to file and present certain supplementary affidavits and granted five days thereafter within which defendants could present countervailing affidavits if desired. Plaintiffs availed themselves of such privilege and on April 15th filed certain supplemental affidavits. But before such time, and on to wit, April 13th, the opinion was written, as appears from the date on the face thereof, although such opinion was not filed in the District Clerk's office until May 3rd. The order granting interlocutory injunction was dated and filed in the District Clerk's office on April 28th and indicated therein the filing of an opinion by the Court.

No specific findings of fact were made by the Court nor separate conclusions of law, except such as were contained, either expressly or by implication, in the opinion of the Court. The opinion mentions numerous facts which it is stated "the testimony showed", and it affirmatively and conclusively appears that the District Court was guided by such "shown" facts in its determination that the State law was unconstitutional. In fact, it appears from the opinion that the Court was largely influenced by such evidentiary considerations. This action by the Court did flagrant violence to the rule laid down in *Polk Company* v. *Glover, etc.*, — U. S. —, 59 S. Ct. 15, text 17, — L. Ed. —, decided by the Supreme Court upon appeal from this same District Court, wherein the Supreme Court stated:

> "The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. See *Borden's Farm Products Co.* vs. *Baldwin*, 293 U. S. 194, 211-213, 55 S. Ct. 187, 192, 193, 79 L. Ed. 281, and cases cited. And that determination requires a hearing in due course upon the issues raised by the pleadings."

In the *Polk* case, *supra*, a law of the State of Florida affecting the canning of citrus fruit was attacked in the District Court and at the time of the interlocutory three-Judge hearing, the State enforcement officers, who were made defendants in the suit, had filed answers as well as motions to dismiss the bill. Voluminous evidence in the form of affidavits and exhibits was adduced by both sides at the hearing. The District Court denied the motion for interlocutory injunction, granted the motion to dismiss the bill, and made separate findings of fact and conclusions of law. Upon appeal to the Supreme Court, plaintiffs therein (who were canners of Florida citrus fruits and who were generally the same canners as are plaintiffs in the instant suit), complained that the District Court should not have made

findings of fact without full hearing in due course upon the pleadings and that the District three-Judge court should not have considered such facts in passing upon the merits of the case at that time. The Supreme Court upon appeal, after observing that "the findings of the court indicate that that evidence, in part at least, underlay the final decree it entered", and that "for the purpose of that motion (to dismiss), the Court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction", held that plaintiffs in that case were entitled "to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues * * * in advance of that opportunity". — U. S. text —, 59 S. Ct. text 17.

The rule announced in the *Polk* case, which merely reaffirmed the rule in the *Borden's Farm Products* case, is of equal force where the facts presented at the interlocutory hearing are used as the basis for holding a State statute unconstitutional as where the facts are used as the basis for holding the State law constitutional.

In the instant case neither the State Commissioner of Agriculture, sole defendant named in the complaint, nor the Florida Citrus Commission, intervening defendant, who were the only defendants before the Court, had filed any answer or other pleadings whatever to the complaint. The complaint comprised 26 typewritten pages, exclusive of exhibits attached thereto. This complaint was replete with allegations setting up a factual situation which plaintiffs contended made the State law and resolution of the Florida Citrus Commission unconstitutional as to plaintiffs. It is true that the opinion in the instant case does not show clearly that the Court meant to finally determine the facts or make any specific findings of fact. What the Court stated in its opinion was only that "the testimony showed"

certain things to exist. Even if it be admitted that plaintiffs' testimony showed these facts to exist (which defendants do not concede), the testimony of defendants, with at least equal force, showed such facts not to exist. The opinion could have with equal celerity and accuracy have stated that "the testimony showed" exactly the opposite of the facts stated in the opinion. It is only by construing the word "showed" as used in the opinion to be equivalent of "established" that the implication can be drawn that the Court intended to find the facts referred to in the opinion.

But whether the Court made findings of fact in its opinion, or merely referred to certain phases of the evidence in passing, the conclusion is affirmative and irresistible that the facts so stated by the Court in its opinion were used as the basis, at least in part, for the adjudication of unconstitutionality made by the Court. This is directly in line with what the Supreme Court in the *Polk* case said could not be done.

Proceeding to the merits of the constitutional questions, defendants submit that such questions are substantial and such as to bring the case upon appeal within the jurisdictional provisions, irrespective of whether the District Court considered the facts in holding the act involved unconstitutional. The consideration of such facts by the Court in arriving at its determination merely makes more substantial the questions presented.

The State law involved in the case, known as the Grower's Cost Guarantee Law, empowers the State Commissioner of Agriculture by and with the advice and consent of the Governor of Florida, to declare the existence of a state of emergency in the citrus industry. Upon such declaration the Florida Citrus Commission determines and fixes the average reasonable cost of production of a standard packed box of producing citrus fruit. The Act then requires every

contract or arrangement with the grower under which his citrus fruit is purchased, marketed or processed, to guarantee the grower in any event such ascertained cost of production and makes unlawful any contract or device whatever whereby the grower is attempted to be precluded from recovering such production cost. The Act provides that in all other respects such contracts of sale, marketing and processing shall be valid. Boiled down, the Act provides that whenever the citrus industry is faced with an emergency, so found to exist by the Commissioner of Agriculture and the Governor, the Florida Citrus Commission shall ascertain how much it cost the grower that season to produce a standard packed box of citrus fruit and, after so fixing and recording such cost of production, the canner or similar dealer in citrus fruit must assure and guarantee to the grower at least his said cost of producing the fruit. The law merely purports to guarantee the average reasonable cost of production and nothing more. No margin of profit is contemplated by the Act.

Pursuant to this law, the State Commissioner of Agriculture on January 13, 1939, by and with the consent and advice of the Governor, declared the existence of such a state of emergency in the citrus industry, whereupon the Citrus Commission fixed the cost of production of grapefruit in Florida for the season 1938-1939 to be 32¢ per standard packed box. The Commission's resolution was adopted and promulgated on January 16, 1939, and became effective on January 20, 1939. The complaint was not filed in this cause until March 23, 1939, and until after the Supreme Court of Florida had held invalid a certain contract attempted to be set up by one of the plaintiffs herein as a means of avoiding the law. See *Mayo* v. *Eckerson Fruit Canners, Inc.*, -- Fla. —, 188 So. 781. Chapter 17,777, Laws of Florida, Acts of 1937, commonly known as the Bond and License law (copy whereof is appended hereto

as Exhibit "B" to the complaint), requires all citrus fruit dealers, including canners, to secure licenses to do business as such in Florida. Section 8 of said Act makes it the duty of the State Commissioner of Agriculture to revoke or suspend the license of any dealer who violates the provisions of that Act or "the provisions of any other law of the State of Florida governing and applicable to citrus fruit dealers." The Bond and License law of 1935 (Chapter 16,860, Laws of Florida, Acts of 1935), of which the 1937 law was a reenactment with certain minor amendments, was held constitutional by the Florida Supreme Court in *Mayo, as Commissioner* v. *The Polk Company*, 124 Fla. 534, 169 So. 41, appeal from which decision by the canners attacking the law was dismissed by the United States Supreme Court for want of a substantial Federal question. 299 U. S. 507, 57 S. Ct. 39, 81 L. Ed. —. Complaint in the instant case was filed to enjoin the Commissioner from proceeding against plaintiffs under the Bond and License law for violation of the Growers' Cost Guarantee Law.

Plaintiffs contended they had the constitutional right to buy grapefruit as cheaply as they could, that many growers were willing to sell at less than the fixed cost price, that plaintiffs could not pay the cost price for grapefruit and successfully compete in the canning field with similar canneries in other States and territories, that because of such foreign competition plaintiffs stood to lose certain established outlets for their products if compelled to pay the grower his cost of production, that shipment of the product in interstate commerce would be burdened, that the Act was too vague to be enforceable, that the cost price was arbitrarily fixed by the Commission, that plaintiffs would be unable to carry out existing contracts for the purchase of the processed product if compelled to pay the grower his cost of production, and that plaintiffs were being discriminated

against because certain cooperative canning organizations were not being required to pay their member growers the cost of production. Plaintiffs contended that the law and the Commission's resolution were each arbitrary, unreasonable, confiscatory and discriminatory, and that the Act denied to the plaintiffs due process of law and the equal protection of the law, and that the Act in operation was a burden on interstate commerce, all in violation of the Federal Constitution. By amendment made at the time of the three-judge hearing, plaintiffs further contended the obligation of contract and their right to freedom of contract had been impaired. These questions, whether substantial before or not, certainly became so when the Court upon application for interlocutory order struck down the State law upon practically all the contentions advanced.

The Supreme Court has taken judicial notice that the citrus industry of Florida is one of its major industries. *Sligh* v. *Kirkwood*, 237 U. S. 52, 35 S. Ct. 501. It would seem to follow that it was a business affected with a public interest such as sustained the validity of an Illinois statute regulating prices to be charged by grain elevators. *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77. In *Nebbia* v. *People*, 291 U. S. 502, 54 S. Ct. 505, the Supreme Court upheld a New York statute authorizing the fixing of the price of milk. It was held that the due process clause of the Federal Constitution did not forbid a State regulation enacted in pursuance of the duty of the State to provide for its general welfare and reasonably calculated to accomplish that end, even though it goes to the extent of regulating prices. The Supreme Court also in *West Coast Hotel Company* v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578, upheld a statute of the State of Washington prescribing and fixing a minimum wage for women. In *Hegeman Farms Corp.* v. *Baldwin*, 6 Fed. Supp. 297, affirmed in 293 U. S. 163, 55 S. Ct. 7, the right of a State Control Board to require additional payments to those from

whom milk had been bought below the fixed price, was upheld, thus carrying forward to its ultimate extent the ruling made in the *Nebbia* case. In *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products*, — U. S. —, 59 S. Ct. 528, a State law of Pennsylvania which empowered a milk control board to fix the minimum prices to be paid by milk dealers to producers and others for milk, was upheld. The right of a State Board, acting under State regulation, to fix minimum prices for laundry and dry cleaning, was upheld by the Florida Supreme Court in *Miami Laundry Company* v. *Florida Dry Cleaning & Laundry & Laundry Board*, — Fla. —, 183 So. 759. A State law under which maximum charges for storage were fixed, was upheld by the Supreme Court in *Brass* v. *State of North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757. A State statute of Georgia fixing maximum charges for handling and selling leaf tobacco was upheld by the Supreme Court, in *Townsend* v. *Yeomans*, 301 U. S. 441, 57 S. Ct. Rep. 842.

The theory underlying the foregoing decisions is that when an industry or a business is affected with a public interest, such business is subject to control by the law-making power for the public good. The Supreme Court in the *West Coast Hotel* case held that the legislature is primarily the judge of the necessity of such an enactment. It was also held in the same case that freedom of contract was qualified and was not an absolute right, nor immune from reasonable regulations and prohibitions imposed in the interests of the community. The right of a State to intrust to a State board or authority the power to fix and prescribe minimum prices to be charged or paid in an industry affected with a public interest, where there is adequate reason therefor, which reason is found to exist by the legislature of the State, can hardly now be doubted. This is exactly what the Act involved in the instant case purported to do, except that it

stops with the actual cost of the production of the article and does not purport to extend to any margin of profit whatever.

The Equal Protection Clause of the Federal Constitution merely requires State laws of like application to apply to all persons similarly situated. See *Barrett* v. *State of Indiana*, 229 U. S. 26, 33 S. Ct. 692; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 56 S. Ct. 253. And in *Currin* v. *Wallace*, — U. S. —, 59 S. Ct. 379, text 386, the Supreme Court upheld as not discriminatory a Federal Act subjecting plaintiffs therein, as tobacco warehouse men, to certain inspection and certification with respect to sales conducted in their warehouses, even though other warehouse men were doing the same sort of business in the same State and competing for patronage among the same growers as the plaintiffs without being subject to the Act. Plaintiffs in the instant case make no contention that all independent canners are not treated alike, and hence, under the foregoing decisions, they cannot complain that the Act is discriminatory or that they are deprived of equal protection. The complaint averred that the Commissioner was construing the Act not to apply to the cooperatives, and the opinion of the Court seemed to sustain the averment. But even if so, the case would fall under the rule that "Mere errors of judgment by officials will not support a claim of discrimination. Moreover, it is not enough to show that a law or ordinance has not been enforced against other persons as it is sought to be forced against the person claiming discrimination. To establish arbitrary discrimination inimical to constitutional equality, there must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity," and the presumption is always in favor of honest purpose in the administration. *12 American Jurisprudence "Constitutional Law"* Sec. 566; *Mackay Teleg. & Cable Co.* v. *City of Little Rock*, 250 U. S. 94, 63 L. Ed. 863, 39 S. Ct. 428; *Sunday Lake Iron Co.* v.

Wakefield Twp., 247 U. S. 350, 62 L. Ed. 1154, 38 S. Ct. 495; *Concordia F. Ins. Co.* v. *People*, 292 U. S. 535, 78 L. Ed. 1411, 54 S. Ct. 830. And in other cases, the United States Supreme Court has held that if the State enforcement officer goes beyond the terms of the statute, he acts as a private citizen and not a State officer, and in such event the State courts, not the Federal courts, should be looked to for redress. *Barney* v. *City of New York*, 193 U. S. 430, 25 S. Ct. 502; *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665, 21 S. Ct. 270; *Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.*, 201 U. S. 166, 26 S. Ct. 425; *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312. Lastly, even if the Act upon its face specifically exempted cooperatives from its terms, and made the same applicable to independent canners only, such distinction would be permissible. The Supreme Court has just upheld the identical distinction. *United States* v. *Rock Royal Co-Op., Inc.*, — U. S. —, 59 S. Ct. 993, 10th headnote, text 1007-1009 and cases there cited.

It cannot be seriously contended the Act here involved violates the Commerce Clause of the Federal Constitution. A State regulation enacted in furtherance of the police power which only incidentally and indirectly affects Interstate Commerce is not forbidden. *Sligh* v. *Kirkwood, supra, Brass* v. *State of North Dakota, supra.* The distinction between "direct" and "indirect" has been clearly defined. *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 546, 55 S. Ct. 837; *Carter* v. *Carter Coal Company*, 298 U. S. 238, 56 S. Ct. 855; *Robbins* v. *Taxing Dist. of Shelby County*, 120 U. S. 489, 30 L. Ed. 694, 7 S. Ct. 592; *Smith* v. *Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 S. Ct. 564. The production of an article intended for interstate commerce is a matter of local regulation, and interstate commerce therein does not begin until actual commencement of its transfer to another State. *Hammer* v. *Dagenhart*, 247 U. S. 251, 62

L. Ed. 1101; *Coe* v. *Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 S. Ct. 475; *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. Ed. 615). The interstate commerce clause of the Federal Constitution does not restrict the exercise of the State's police power. *N. Y. & N. H.* v. *N. Y.*, 165 U. S. 628, 41 L. Ed. 853, 17 S. Ct. 418. Until such time as a commodity actually commences its journey from one State to another, the State in which the commodity is located has full jurisdiction to regulate its manufacture and production. *Chessnol* v. *City of Greenwood*, 291 U. S. 584, 78 L. Ed. 1004. And lastly, even though the subject matter of the Act is within the jurisdiction of Congress under the interstate commerce clause, yet if Congress has not legislated specifically on the subject the State may do so. *Western Union Telegraph Company* v. *Crovo*, 220 U. S. 374, 55 L. Ed. 502, 31 S. Ct. 376; *Gulf C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 98, 39 L. Ed. 910. And in the recent case of *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products, supra*, it was held that States remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority, in cases where under the interstate commerce clause it would have jurisdiction to act if it chose to do so. There is no contention in the instant case that Congress has presumed to enter the field of fixing and guaranteeing the cost of production of citrus fruit.

Plaintiffs complain that the Florida Citrus Commission determined and recorded the cost of production of grapefruit before procuring from producers, shippers or handlers of citrus fruit, not subject to the provisions of the Act, binding agreements to conform thereto and abide by its terms. It was contended that the procuring of such agreements was, under Section 3 of the Act, a condition precedent to the fixing of cost of production. In the first place, such provision is not mandatory but merely directory. The local law would prevail in the construction of said provision, and the

Supreme Court of Florida in *Apgar* v. *Wilkinson*, 95 Fla. 457, 116 S. 78, has held that similar wording in a statute merely constitutes an authorization or clothing of State officers with power and authority to do the things enumerated rather than to impose mandatory duties. It was held that "Where mandatory words or provisions are written in statutes defining the duties of administrative officers, such words or provisions may be construed as directory only, unless something in the body of the act is indicative of the contrary view". In the second place, it seems frankly apparent that such language in the instant Act is meaningless. Certainly all producers, shippers, or handlers of citrus fruit in Florida are subject to the Act. And if they are so subject to the Act they are bound by the provisions thereof by the terms of the Act itself and no necessity arises for procuring any binding agreements from any of them or to indulge in any attempted supertechnical analysis of the Act to determine which of such handlers should be bound automatically by the Act and which should give binding agreements to conform thereto. The Florida Citrus Commission found as a fact in its Resolution of January 16, 1939, that "all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said Act". There was no proof by plaintiffs to the contrary. Again resorting to the local rule of construction, the Supreme Court of Florida in *Therrell* v. *Smith*, 124 Fla. 197, 169 So. 388, held that where a proviso can be given no sensible effect, or is so worded that it cannot be with certainty said to mean any particular thing, it shall and will be entirely disregarded. In the third place, the matter is not one for Federal jurisdiction. If the Florida Citrus Commission has proceeded contrary to the face of the Act, it is a matter for the State Courts and not the Federal Courts. See *Barney* v. *City of New York, supra, Home Telephone & Telegraph Company* v. *City of Los Angeles, supra.* No ground of

Federal jurisdiction can be predicated upon such alleged wrongful action of the State Commission. The District Court in its opinion held that there was "no proof in the record" that the Commission had secured such consent and agreement from producers and others not subject to the provisions of the Act, and that because of such lack of proof, the State Commissioner should be enjoined from enforcing "the fixed price". It was held that while this feature of the Act might not render it violative of the Constitution it would "certainly" require injunction. The District Court thus applied a wholly untenable rule in placing the burden upon the proponents of the State law to show their right of enforcement, rather than upon those challenging the State law to show why enforcement should be restrained. Merely to say there was no proof in the record that the Commission had acted in pursuance of the law was not to deny that the Commission had acted lawfully.

The District Court in its opinion urged a hypothetical case involving the citrus grower and apparently held the Act unconstitutional because arbitrary and prejudicial to the grower. The Court posed the factual situation of a grower who had raised a crop of citrus fruit at a cost of $10,000 and then because of the operation of the Act could not sell it for even $8,000 and thus stood to lose his entire crop. But even if true, no growers are before the Court complaining. Only independent canners of citrus products are asking that the Act be stricken down. The Act is for the protection, rather than the detriment, of the grower. By benefitting the grower primarily, the entire citrus industry is benefitted and thus the Act protects the industry as a whole. The industry cannot survive unless the grower survives. The grower cannot survive if he cannot receive at least the cost of producing his product. If the grower cannot be made to survive, then the entire industry will collapse because the product itself will not be produced. However, it is only

necessary to consider that the Court was not authorized or warranted in holding the Act unconstitutional because of harmful results to the grower when no grower was before the Court complaining, nor was the effect of the Act upon the grower at all involved or explored or presented in the case.

Certain findings of fact purportedly made by the Court in its opinion are not sustained by the evidence. Thus the statement that the cooperative organizations did not pay cash for their fruit to the growers, but merely credited them with the amount involved, which amount the organizations were not expected to pay unless the market prices enabled them so to do, is not borne out by the evidence. See affidavit of J. F. Mays, representative of State Commissioner of Agriculture. The evidence of plaintiffs to the contrary is at best merely hearsay. Likewise the finding of the Court that the State Commissioner must have construed the Act so as to authorize him to discriminate against the independent canners. Plaintiffs presented no evidence that the Commissioner had so construed the Act, but the Commissioner's own evidence showed he did not so construe it. The Court found that plaintiffs had made contracts for the sale of citrus juice for future delivery which they were forced to cancel when the "cost price" was fixed by the Commission. One of plaintiffs testified he had existing contracts for $100,000 worth of processed grapefruit to be purchased by certain Pacific Coast dealers and distributors but that such distributors had agreed to increase their cost price of the processed product if the Act here involved were upheld. Thus the findings of the District Court, if the same can be classified as findings, present substantial questions because of the extremely doubtful character of the testimony to sustain them.

No finding or adjudication was made by the District Court as to the requisite jurisdictional amount of $3,000, exclusive

of interest and costs, being involved in the case. But in proceeding to and passing on the merits of the case the Court, by necessary implication, held the existence of such jurisdictional amount. The evidence wholly fails to sustain the existence of the requisite amount to confer jurisdiction upon the Federal Courts. See *McNutt, Governor* v. *General Motors Acceptance Corporation,* 298 U. S. 178, 80 L. Ed. 1135; *McNutt, Governor* v. *McHenry Chevrolet Co. Inc.,* 298 U. S. 190, 80 L. Ed. 1141; *KVOS, Inc.,* v. *Associated Press,* 299 U. S. 269, 81 L. Ed. 183; In the *General Motors* case, *supra,* the Supreme Court held that even though the jurisdictional facts be not challenged, the plaintiffs must support them by competent proof and that the Court "may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence" (298 U. S. 188). Certainly before striking down a State statute the Court should require the existence of jurisdictional facts be made affirmatively to appear. While under the *General Motors* case the Court may, merely for purpose of passing upon interlocutory injunction, in its discretion not require proof of the jurisdictional amount, where not challenged in some appropriate manner, yet when the Court presumes to finally adjudicate a State law unconstitutional, whether such adjudication be made at the interlocutory stage or at final hearing, the Court should not indulge a discretion in the matter, but should as a matter of positive duty require proof of jurisdictional facts before pronouncing such drastic judgment. In determining whether the requisite jurisdictional amount is in controversy, where it does not appear that the plaintiff is deprived of its license or is prevented by the regulation from prosecuting its business, the question is not the value or net worth of the business, but the value of the right to be free from the regulation, and this may be

measured by the loss, if any, that would follow the enforcement of the rule prescribed. *McNutt* v. *General Motors Acceptance Corporation, supra; Kroger Grocery & Baking Co.* v. *Lutz, Attorney General,* 299 U. S. 300, 81 L. Ed. 251.

The substance of the questions presented as aforesaid cannot be doubted. Plaintiffs contended the questions were quite substantial when they filed their complaint. The District Court of three Judges considered the questions substantial when it struck down the State law upon the interlocutory hearing, without waiting for further exposition of facts or further argument of counsel. Defendants have never denied the questions were substantial and do here assert it. The situation is materially different than if the Court had merely granted interlocutory injunction pending further proceedings in the cause and deferred passing upon the constitutional questions until after all the evidence was in and final hearing was had. Here, the District Court took an extremely short cut and struck down the law as unconstitutional upon the interlocutory hearing and even went into the facts as "shown" by the evidence introduced at that hearing. Defendants later filed their answer setting forth defenses in law and in fact, but such was merely to save their day in Court.

E—Cases Sustaining Jurisdiction.

The following cases are believed to sustain the jurisdiction of the Supreme Court: *Lemke* v. *Farmers Grain Company,* 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458; *Connolly* v. *Union Sewer Pipe,* 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679; *Savage* v. *Jones,* 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182; *Polk Company* v. *Glover, etc.,* — U. S. —, 59 S. Ct. 15, text 17, — L. Ed. —; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 55 S. Ct. 187, 79 L. Ed. 281; *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163, 55 S. Ct. 7; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 57 S. Ct. Rep. 578;

Nebbia v. *People of the State of New York*, 291 U. S. 502, 54 S. Ct. Rep. 505; *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products*, — U. S. —, 59 S. Ct. 528; *Sligh* v. *Kirkwood*, 237 U. S. 52, 35 S. Ct. Rep. 501; *Townsend* v. *Yeomans*, 301 U. S. 441, 57 S. Ct. Rep. 842; *Barney* v. *City of New York*, 193 U. S. 430, 25 S. Ct. 502; *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 80 L. Ed. 1135.

F—Appending Copies of Opinions, etc.

There are appended hereto copies of the opinion of the District Court dated April 13, 1939, filed May 3, 1939, and of the Order of the District Court granting the motion for interlocutory injunction, dated and filed April 28, 1939, and copy of the complaint filed March 23, 1939, and copy of the amendment to the complaint filed April 10, 1939.

Respectfully submitted,

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EXHIBIT "A".

(Title Omitted)

This case was argued and submitted on April 10th, on the bill and testimony.

The defendants appeared and though they had not filed answers, argued the case and requested the Court to pass on all questions presented, and especially on the constitutionality of the Act involved.

The Act is found in Florida Acts of 1935, page —.

Grower's Cost Guarantee Law.

AN ACT relating to citrus fruit; Prescribing conditions and limitations upon the sale, marketing and processing thereof, and the effect of contracts of sale and of marketing and processing agreements.

WHEREAS, it is found by the Legislature and hereby declared that the production and distribution of citrus fruit is a paramount industry in Florida upon which the prosperity of the State in a large measure depends; that such fruit and the juices thereof have become and are generally used in great and rapidly increasing quantities, both voluntarily and upon advice of physicians, by people of all classes, ages and conditions; that it is necessary for the reasonable comfort, welfare and health of the people and in order to build up their strength and vigor, that an adequate and dependable supply of high grade citrus fruit in the State of Florida is therefore hereby declared to be a business affecting the public health and interest, that unfair, unjust, destructive, demoralizing, and uneconomic trade practices have been and are continuing to be carried on in the sale and distribution of citrus fruit in this state to the extent that such fruit has been and is continuing to sell in many cases at prices below the cost of production and the constant, dependable and adequate supply of such fruit for sale and consumption is thereby so seriously imperiled as to threaten the break down of the industry; that the present acute economic condition in Florida is in part the consequence of a severe and in-

creasing disparity between the prices of citrus fruit and other commodities; that it is both expedient and necessary to build up the quality and reputation of Florida's citrus fruit in the market and to stabilize the Florida citrus industry and to protect the public and the growers against fraud, deception, and financial loss through further continuation of unscrupulous practices and haphazard methods in connection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

THEREFORE, in the exercise of the police power of the State, for the purpose of protecting and promoting the public health and general welfare,

* * * * * * *

SECTION 3. The Commissioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitioners signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time to time may make, and after the Citrus Commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the average reasonable cost per standard packed box of producing citrus fruit and every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm, corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said

cost of production, to be ascertained by multiplying the said cost per standard packed box as shown by the record of the Commission current at the time the contract, agreement, plan of arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

We are not concerned with Sections one and two, but the provisions of Section three raise all the questions with which we are concerned.

Taking up these in the order of their importance, we consider whether it violates the due process clause of the Fourteenth Amendment. We are aware of the fact that many of the later decisions on the due process clause have gone far beyond the earlier ones.

The latest authoritative decision in which this question is discussed is West Coast Hotel Co. *v.* Parrish, 300 U. S. 491, which says:

> "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting the deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject

and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described.

But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." Chicago B. & Q. R. Co. *v.* McGuire, 210 U. S. 549, 567.

The definition of due process here given contains two positive requirements. First: the regulation must be as applied to the Citrus business, reasonable. To be reasonable it must not be arbitrary, nor should it be unjust to any of those whom it undertakes to regulate. Second: it must have been adopted in the interests of the community. In other words, the community or the public must have an interest in or be concerned with such regulation.

The protection of the public should be the prime purpose of the regulation and not the business to be regulated.

Take the citrus industry as a whole and it is manifest that it is as much dependent on the canners as upon the growers, for we all know that the fruit in its natural State cannot be stored for future sale as grain is done, but that the juices when processed and canned can be. So if a crop is raised too large to be sold as gathered, the price of the fruit will be greatly reduced and the loss much greater than if the excess fruit is canned and the juices stored for future sale. The canner who processes the fruit and preserves the juice plays an important part in buying the excess fruit

and processing it. The Act recognizes the canners in the reference to "the fruit and the juices thereof", and to processing the same. The testimony showed that this year's crop is large, and the Citrus Commission fixed the cost to the grower of raising the crop of grapefruit at thirty-two cents a box, and that the canner could not pay that price and the cost of processing it and sell the juice without suffering a loss.

It further showed that the canners had established businesses of years standing with a large investment, employing several thousand employees.

That they had made contracts for sale of juice for future delivery and that they were forced to cancel when the cost price was fixed by the Commission.

The effect of this was that the canners were penalized for the benefit of the growers if the canners continued business.

The testimony also showed that many of the growers had organized cooperative corporations to process their grapefruit, the cooperative did not pay cash for their fruit to these growers, but credited them with the amount of the price of the fruit and were not expected to pay for it unless the market prices enabled them to pay it, and the Commissioner did not enforce payment while requiring payment of the regular canners.

This certainly was discrimination against the canners, and the Commissioner must have construed the Act so, as to authorize him to do this.

The Act makes a sale for less than the price fixed unlawful. Suppose the price fixed by supply and demand is less than that fixed by the Commission, a sale by a grower for any less price would be unlawful.

If his actual cost of raising his crop were ten thousand dollars, he could not sell it for eight thousand dollars and so minimize his loss, but would be compelled to let it spoil on the trees and so lose the whole crop.

Is not this alone sufficient to make the Act arbitrary and prejudicial? We find the Act unconstitutional.

There is one other feature of the Act which may not render it violative of the Constitution, but certainly requires enjoining the Commissioner from enforcing the fixed price.

The Act provides that *after* the Citrus Commission shall have procured from producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the annual reasonable cost per standard box, of producing citrus fruit, etc.

There is no proof in the record of any such consent and agreement having been secured by the Commission.

We therefore conclude that the injunction should be granted.

LEON MCCORD,
U. S. Cir. Judge.
ROBERT T. ERVIN,
ALEXANDER AKERMAN,
Judges.

April 13, 1939.

EXHIBIT "B".

[Title omitted]

Order of the Court.

This cause coming on to be heard before the undersigned Judges on the Motion for an Interlocutory Injunction, and after hearing the evidence and argument of counsel and for the reasons to be expressed in an opinion to be filed later, It is Considered, Ordered and Decreed by the Court that the Motion for Interlocutory Injunction be and the same is hereby granted, and the restraining order heretofore issued by the District Judge is continued in full force and effect until the final hearing in this case or until the further order of the Court.

Done and Ordered, this the 28th day of April 1939.

LEON MCCORD,
Judge, United States Circuit Court of Appeals.
ROBERT T. ERVIN,
United States District Judge.
ALEXANDER AKERMAN,
United States District Judge.

EXHIBIT "C".

[Title omitted]

Complaint.

Come now the Plaintiffs and would show unto the Court:

I.

(a) That the Lakeland Highlands Canning Co. Inc., is a corporation organized and existing under the laws of the State of Florida, duly authorized and qualified to do business in the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Highlands City, in Polk County, Florida;

(b) That The Polk Company is a corporation organized and existing under the laws of the State of Indiana, duly authorized and qualified to do business in the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Polk County, Florida;

(c) That Roberts Brothers, Inc., is a corporation organized and existing under the laws of the State of Maryland, duly authorized and qualified to do business in the State of Florida, and engaged extensively, as more particularly hereinafter set out, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff for canning citrus products is in Polk County, Florida;

(d) That Florida Grapefruit Canning Co., is a corporation organized and existing under the laws of the State of Florida, duly authorized and qualified to do business in the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Manatee County, Florida;

(e) That Apte Brothers Canning Co. is a co-partnership composed of D. J. Apte and R. W. Apte, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Hillsborough County, Florida;

(f) That Floridagold Citrus Corporation is a corporation organized and existing under the laws of the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is in Polk County, Florida;

(g) That Bordo Products Company is a corporation organized and existing under the laws of the State of Illinois, duly authorized and qualified to do business in the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is in Polk County, Florida;

(h) That Hills Brothers Co. of Florida is a corporation organized and existing under the laws of the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Tampa, Hillsborough County, Florida;

(i) That Bruce's Juices, Inc., is a corporation organized and existing under the laws of the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Tampa, Hillsborough County, Florida;

(j) That Eckerson Fruit Canners, Inc., is a corporation organized and existing under the laws of the State of Florida, and engaged extensively, as more particularly set out hereinafter, in the canning of citrus products produced and grown in said State; that the principal place of business of said plaintiff is Sanford, in Seminole County, Florida;

(k) That Sundine Company is a Delaware corporation authorized to do business in the State of Florida, and engaged in the citrus canning business in this District.

II

That the defendant, Nathan Mayo, is Commissioner of Agriculture of the State of Florida, and maintains his principal office in the County of Leon, State of Florida, with representatives within the jurisdiction of this Court for the purpose of enforcing the act attacked hereinafter, in this complaint.

III

This cause involves a controversy in excess of $3,000.00 exclusive of interest and costs, and arises under the Constitution of the United States of America.

IV

That during the past decade the canning of grapefruit and grapefruit juice with other citrus has developed into one of the principal industries of the State of Florida. The principal products canned are grapefruit hearts or sections and grapefruit juice, other citrus juices, orange juice and combination juices or grapefruit and oranges, and some citrus salad; the grapefruit and grapefruit juice constituting the large majority of the citrus canning industry. During the past seven years the volume of the products canned is as follows:

(Converted into No. 24/2 cans)

	Grapefruit.	Grapefruit Juice.	Combination Juices.
1931-1932	895,962 cases	235,034 cases	
1932-1933	2,138,285	722,721	
1933-1934	2,145,499	605,817	
1934-1935	3,539,456	2,175,695	
1935-1936	2,149,610	1,608,287	80,800 cases
1936-1937	3,971,624	3,709,751	265,684
1937-1938	3,419,226	3,370,002	574,329

During this period of time there was also canned approximately 1,500,000 cases of orange juice and 200,000 cases of citrus salad and 500,000 cases of combination juices.

This industry constitutes an important and valuable outlet for grapefruit in the State of Florida. During the last five years the amount of grapefruit thus utilized was 24,334,804 boxes.

During said five-year period the percentage of grapefruit grown in Florida that has been used in the canning production has steadily increased, as shown by the following table:

Percent of production used by the Canners	1933-34	1934-35	1935-36	1936-37	1937-38
	21.78%	36.51%	32.01%	37.14%	41.44%

Of this total pack plaintiffs herein for the past three years packed the following aggregate amounts and average annual amounts in cases:

Canned Grapefruit Products

Plaintiff.	3-year total pack.	Annual average pack.
Lakeland Highlands Co.	980,081	326,693
The Polk Company	2,587,000	862,333
Roberts Brothers, Inc.	355,415	118,471
Florida Grapefruit Canning Co.	765,241	255,080
Apte Brothers Canning Co.		
Floridagold Citrus Corp.	1,816,427	605,475
Bordo Products Company	1,434,849	478,283
Hills Bros. Co. of Fla.	1,209,038	403,012
Bruce's Juices, Inc.	618,298	206,099
Eckerson Fruit Canners, Inc.		
Sundine Company (1935-36 season only)	80,000	80,000

Plaintiffs herein have thus packed over the 3-year period far in excess of 60% of the total pack of the canned grapefruit and grapefruit juice in the State of Florida.

Estimated pack for the present season 1938-1939 was that the pack would be far in excess of the pack for any period season in the history of the State of Florida; however, because of the facts and circumstances hereinafter alleged the

pack to date is approximately 2,000,000 cases less up to the time of filing this complaint than was packed during the same period of the season of 1936-1937, which was the largest season up until the present season; even though up to the effective date of the Regulation of the Citrus Commission, to-wit: January 19, 1939, these plaintiffs and all other canners had canned an unusually large volume of products.

IV-A.

Plaintiffs would show unto the Court that each of them, since January 19, 1939, has been offered large volumes of grapefruit from many of the growers of the State of Florida at prices ranging from 12 for fruit to be canned into grapefruit juice, to 20¢ to 25¢ per field box for fruit to be canned into sections or hearts; and that each of said plaintiffs, except for the provisions of the said Regulation and said Act, could and would have purchased said grapefruit and canned the same and sold the canned product to the different distributors at a profit far in excess of $3,000.00.

IV-B.

Many growers own their own canning plants and have been canning their grapefruit without the burden of the law hereinafter referred to; that many growers have been canning their grapefruit through cooperative organizations to which the defendant contends the price law does not apply.

That by reason of the foregoing facts canned grapefruit is now being offered for sale at prices which do not net the grower 32¢ per box on the tree.

These plaintiffs allege that because of the foregoing facts the said Growers' Cost Guarantee Law, hereinafter referred to, and the Regulation thereunder, are discriminatory in that it attempts to force these plaintiffs to pay a minimum price for their raw products while permitting others to operate in competition to these plaintiffs unrestrained by the provisions of said Law and Regulation; and unless the relief herein prayed for is granted these plaintiffs will have their property taken without due process of law, and will suffer irreparable damages to each far in excess of $3,000.00.

V.

Canned grapefruit and grapefruit juice packed in the State of Florida are widely distributed in interstate commerce and in excess of 99% of all canned grapefruit products canned by the plaintiffs named herein are canned solely for and go into interstate commerce; such products being sold in almost every state in the United States, and in foreign countries.

Of the canned products of the plaintiffs herein the percentage of their grapefruit and grapefruit juice pack sold in interstate commerce is as follows:

Plaintiff.	Sold in interstate commerce.	Sold in Florida.
Lakeland Highlands Canning Co., Inc.	99½%	½%
The Polk Company	100%	none
Roberts Brothers, Inc.	99%	1%
Florida Grapefruit Canning Co.	99½%	½%
Apte Brothers Canning Co.	99¾%	¼%
Floridagold Citrus Corporation.	99.92%	.08%
Bordo Products Company	100%	none
Hills Brothers Co. of Florida	97%	3%
Bruce's Juices, Inc.	99 14/15%	1/15 of 1%
Eckerson Fruit Canners, Inc.	98%	2%
Sundine Company	99.90%	1/10%

The amount of such canned citrus products consumed in the S. 'e of Florida is negligible.

During the 1936-1937 season, that is, beginning November 1st, 1936, up to and including October 15, 1937, there were exported 847,884 cases of canned grapefruit, of which 843,800 cases were shipped to the United Kingdom, and the remaining number of cases were shipped to France, Belgium, Holland, Germany, India, Egypt and South America, and during the same period of time there were exported to the same countries an aggregate of 34,427 cases of grapefruit juice.

VI.

The packing season for the canning of citrus products grown in the State of Florida begins about the first of November of each year and reaches volume production in about two weeks, and the canning continues until June or July of the following year. Preparations for canning necessitates the ordering of cans, labels, making contracts for the purchase of fruit, securing labor, the planning of factory operations in general. In addition it is the commercial practice, and frequently financing of the pack requires the packer to secure sales orders for the finished product in advance of or at the opening of the packing season.

VII.

During the past six years the canning of citrus products in other areas has largely increased and is now in serious competition with the citrus packed in the State of Florida. During the 1937-1938 season there was produced in the State of Texas 102,483 cases of grapefruit sections or hearts and 4,344,540 cases of grapefruit juice, and it is estimated that the crop of grapefruit in Texas this season will be approximately 15,000,000 boxes, which is by far the largest crop in the history of the industry in Texas.

The territory of Puerto Rico has produced approximately 200,000 cases of grapefruit sections each year for the past few years. In addition, production of canned grapefruit in states other than Florida has amounted to approximately 100,000 cases.

The crops in the states other than in the State of Florida, as well as in this State, have continued to grow over a period of years and the canned citrus products produced in states other than the State of Florida actively compete in interstate commerce with the canned citrus products produced in Florida. In addition, canned grapefruit juice competes with other fruit juices, such as tomato juice and pineapple juice, and any impediment upon the ready purchasing of grapefruit juice will cause a shift in consumption to other juices and diminish the volume of production and shipment in interstate commerce from the State of Florida.

Within the last few days canned grapefruit juice produced and canned in the State of Texas has been offered for sale at a price of from 42¢ to 45¢ per doz. f.o.b. Texas in large volumes, and unless the injunction herein prayed for is granted these plaintiffs will be unable to compete with such competition. Plaintiffs are informed and believe and so allege the facts to be that the different companies canning in the State of Texas are now buying grapefruit at a price of 12¢ to 20¢ per field box delivered to the canning plant, which is less than one-half of the minimum price fixed by the regulation.

That over a period of years Florida canned grapefruit has enjoyed such a place in the markets that it could demand a slightly higher price than that canned in Texas and other places but unless the relief herein prayed for is granted so these plaintiffs will not have to face a "pegged" price, they will be unable to can grapefruit to compete with that canned in Texas and other places, and the canning industry of Florida will suffer an irreparable loss and each of these plaintiffs will thereby suffer damages in excess of $3000.00.

VIII.

The plaintiffs and each of them have invested in the State of Florida, in canning factories, receiving stations, and other necessary equipment far in excess of $100,000.00, and that the total of such investments by all of the plaintiffs exceed the sum of $2,000,000.00;

That annually during the citrus packing season in Florida plaintiffs operate their several canning plants and factories and employ daily in and about the processing, canning, labelling and packing of grapefruit sections and juice approximately 5000 persons, and the weekly pay-roll of the plaintiffs throughout the canning period for the citrus season amounts to approximately $100,000.00 each, and every week of their operation.

IX.

That there was grown in the State of Florida during the present season approximately 21,000,000 boxes of grapefruit, which is the largest production in the history of the citrus industry in the State of Florida; that because of the enactment of the statute hereinafter referred to and the

regulation promulgated thereunder by the Florida Citrus Commission it has been impossible for these plaintiffs to operate their factories and pay the grower the sum of 32¢ per field box and that there are approximately 2,000,000 cases less canned in the State of Florida at this time than there were at the corresponding date in the season 1936-1937, which was the heaviest pack up until this season, and that the grapefruit which would have been put in said cans, had the plaintiffs been permitted to operate without the interference of the Act hereinafter set forth, is practically all decayed and rotting because the growers, who did not own a canning plant or belong to a cooperative were unable to sell their fruit.

Many growers in the State of Florida are ready, willing and anxious to dispose of their fruit to the plaintiffs or some of them at whatever price market conditions will warrant, but plaintiffs are unable to purchase said fruit because of the Act hereinafter referred to, and said fruit will be permitted to drop from the trees and to rot and decay in the groves.

X.

Plaintiffs only operate their canning plants during the season for packing and canning which is a period of approximately seven months as hereinbefore alleged; that in order to be prepared to operate their plants during said season it is necessary that the plaintiffs keep on an annual pay-roll many employees during the period of time when they are not in operation and that when the plants are not in operation the plaintiffs suffer large expenses and costs in overhead expenses, salaries, administrative expenses, factory personnel, electricity or other power for operating their plants, and taxes. Plaintiffs allege that if this Court does not grant the injunction herein prayed for they will be unable to operate the remaining portion of this season and the loss to each and every of said plaintiffs will far exceed the sum of $3,000.00 in overhead costs, salaries, etc. as above set forth.

Plaintiffs say that each of them suffer losses in excess of $400.00 per week in pay-roll expenses alone while they are shut down and if the relief prayed for herein is not granted they will be forced to keep their plants closed for the re-

mainder of the season and each thereby suffer loss in excess of $4500.00 for that item of expense alone.

XI.

Plaintiffs in their several businesses depend to a large extent on certain distribution channels and that because of the inability of the plaintiffs to operate their plants this season due to the Act and the Regulation hereinafter referred to, the Plaintiffs have been and will be unable to take care of the requirements of their different distributors and dealers throughout the United States and foreign countries; that these distributors and dealers have over a period of years built up good will for the different brands canned and labelled by the plaintiffs and have used merchandising efforts such as advertising and display to increase the consumption of the canned products of these plaintiffs, and to further the good will of said products.

Plaintiffs allege that unless the relief herein prayed for is granted, the plaintiffs will be unable to can their grapefruit and grapefruit juice in accordance with the requirements of their trade and that they and each of them will suffer irreparable loss and damage to their trade, good will and trade-marks, far in excess of $3,000.00 to each of said plaintiffs; that if over a period of time these plaintiffs are ever able to regain the good will for their products that they now enjoy, it would only be at a tremendous cost and expense to these plaintiffs and each of them.

These plaintiffs further allege that grapefruit and grapefruit juice are in competition with many other canned products such as tomato juice and pineapple juice, and that to meet said competition it is necessary that the products be continuously before the public, and that the retail price of same be kept on a competitive base with other products; that if this Court does not grant the relief herein prayed for canned grapefruit and grapefruit juice canned by these plaintiffs will be supplanted by other products because of the inability of these plaintiffs to can grapefruit and grapefruit juice.

If these plaintiffs were able to pay 32¢ per field box to the growers as required by the Act hereinafter referred

to, and the Regulation promulgated thereunder, it would be necessary for these plaintiffs to receive for the canned products between 62¢ and 70¢ per doz. for grapefruit juice, and that there is now being quoted in the State of Texas grapefruit juice at 42¢ per doz.; that should these plaintiffs attempt to comply with the Act hereinafter referred to and the Regulation thereunder by paying 32¢ to the grower per field box, they would each suffer a tremendous loss in meeting competition of the Texas juice as quoted above.

XII.

These plaintiffs have been warned by the Commissioner of Agriculture that if they attempt to operate their plants and not pay the grower 32¢ per field box their licenses will be revoked, but these plaintiffs allege that there are several thousand cases of grapefruit and grapefruit juice in the State of Florida at this time which have been canned and are now being canned upon a cooperative basis and there is now being offered on the markets canned grapefruit canned in the State of Florida by some of the cooperative associations at a price of 80¢ per doz., and these plaintiffs allege that when the necessary costs of canning and sales thereof are deducted from the returns on a basis of 80¢ per doz., there is not a sufficient amount left to pay the grower the sum of 32¢ per field box, and that if the Act hereinafter set forth and the Regulation thereunder are held valid and enforceable then these plaintiffs will be unable to compete with the fruit and fruit juices that are being canned by the cooperative organizations and the large investments of these plaintiffs will be lost, resulting in irreparable damage to each of the plaintiffs in a sum far in excess of $3,000.00.

XIII.

That the Legislature of the State of Florida of 1935 enacted Chapter 16862, which is hereinafter referred to as the Growers' Cost Guarantee Act, copy of said Statute being hereto attached, marked Exhibit "A", and by reference made a part of this Complaint.

XIV.

That the Legislature of the State of Florida of 1937 enacted Chapter 17777 Laws of Florida, hereinafter referred to as the Bond and License Law, a copy of said Act being hereto attached, marked Exhibit "B", and by this reference made a part of this Complaint.

XV.

Each of the plaintiffs herein is a canner of citrus fruits and holds a license issued by the Commissioner of Agriculture under the Bond and License Law, and has filed a good and sufficient bond in accordance with such law.

XVI.

That under the provisions of the Growers' Cost Guarantee Act during the present season the defendant, Nathan Mayo, as Commissioner of Agriculture, by and with the consent and advice of the Governor of the State of Florida has declared the existence of a state of emergency in the citrus industry, on or about the 13th day of January, 1939.

That the Florida Citrus Commission, on or about the 16th day of January, 1939, passed a certain Resolution, copy of which is hereto attached, marked Exhibit "C", and by this reference made a part of this Complaint.

The said Resolution states that there has been presented to the Florida Citrus Commission petitions signed by persons, firms, corporations and associations, which the Commission finds own or control 50% or more of the producing acreage of citrus fruit and 50% or more of the producing acreage of grapefruit in the State of Florida, requesting the Commission to determine the average reasonable cost per standard packed box of producing grapefruit, but these plaintiffs allege that the Citrus Commission did not have filed before it at the time of the passage of said Resolution petitions signed by persons, firms or corporations owning 50% or more of the producing acreage of citrus fruit in the State of Florida.

XVII.

The said Growers' Cost Guarantee Act provides that the basis for ascertaining whether the petitions were signed by persons, firms or corporations owning or controlling 50% or more of the producing acreage of citrus fruit was to be the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further survey as the Citrus Commission may from time to time make.

Plaintiffs allege that the determination of the percentage was not based upon any survey made by the Federal Emergency Relief Administration, nor was it supplemented by any survey made by the Florida Citrus Commission, and that therefore the Florida Citrus Commission had no right, authority, power or jurisdiction to issue the Regulation, copy of which is attached hereto as Exhibit "C".

XVIII.

The said Growers' Cost Guarantee Act likewise provides that before determining the reasonable cost per standard packed box the Citrus Commission should have from the producers, shippers and handlers of citrus fruit, not subject to the provisions of the Act, binding agreements to conform thereto and abide by its terms. Plaintiffs allege that at and before the passage of the Resolution, a copy of which is attached hereto as Exhibit "C", the Citrus Commission had procured no agreements whatsoever from producers, shippers or handlers of fruit, not subject to the provisions of the Act, and therefore the Florida Citrus Commission had no power, authority or jurisdiction to issue the said Regulation, copy of which is hereto attached as Exhibit "C".

XIX.

Plaintiffs further allege that the 32¢ price for grapefruit determined by the Florida Citrus Commission in its Resolution dated January 16, 1939, copy of which is attached hereto as Exhibit "C", is arbitrary, capricious, unreasonable, unfair, inequitable and confiscatory and con-

stitutes a denial of property rights of these plaintiffs without due process of law; that said price was not properly determined by the Florida Citrus Commission, as required by the Growers' Cost Guarantee Act, but was adopted as the result of experiments on certain isolated groves by certain persons who were not members of the Florida Citrus Commission, and that the said price is not the actual cost of production nor an average reasonable cost per standard packed box of grapefruit throughout the State of Florida;

That among other things, the said 32¢ basis includes 9.8¢, considered by the Commission to represent interest on investment by the grower.

XX.

Plaintiffs further allege that Eckerson Fruit Canners, Inc., one of the plaintiffs herein, heretofore obtained a temporary injunction from the Circuit Court of Seminole County, Florida, in a suit wherein the Commissioner of Agriculture claimed that the said plaintiff was violating the Growers' Cost Guarantee Act by operating its factory under a certain contract with the grower, whereby the said plaintiff was canning grapefruit for the account of the growers and charging the growers for the cost of canning; that the said cause was appealed to the Supreme Court of Florida, which Court on March 17, 1939, rendered its opinion holding that said contract did violate the provisions of the said Growers' Cost Guarantee Law, but in said cause the said Supreme Court of Florida did not consider the constitutional validity of the Growers' Cost Guarantee Law.

That for a period of approximately fourteen days these plaintiffs, or a majority of them, have been attempting to operate their plants under contracts somewhat similar to the said contract of the plaintiff, Eckerson Fruit Canners, Inc., but that since the decision above referred to, rendered by the Supreme Court of Florida, the defendant, Commissioner of Agriculture, has threatened to revoke the license of each and every of these plaintiffs if they continue to operate under such contracts and these plaintiffs believe and so allege that the said Commissioner will revoke their licenses unless enjoined by this Honorable Court.

XX-A.

Plaintiffs say that in excess of 99% of their finished canned products have gone and do go directly into interstate commerce and are shipped to the several States of the United States as well as to foreign countries, and that the enforcement of the Act will violate Article I, Section 8 (3) of the Constitution of the United States, as it imposes a burden on and directly interferes with interstate commerce.

If said law and the Regulation thereunder are held valid then these plaintiffs will be unable to operate their plants, and can grapefruit and grapefruit juice, and the flow of their canned grapefruit and grapefruit juice by these plaintiffs into interstate commerce will be completely stopped.

The effect of said Act will be to attempt to fix the sale prices of grapefruit and grapefruit juice canned in the State of Florida wherever the sales may be made in the United States or in foreign countries, although grapefruit and grapefruit juice canned in the State of Florida under the provisions of said Act and the Regulation thereunder must compete in the open market with grapefruit and grapefruit juice canned in other states.

XXI.

The Growers' Cost Guarantee Act is unreasonable, arbitrary and vague.

The said Act is so vague and indefinite that the true intent and purpose of the Act cannot be ascertained therefrom;

(a) the said Act provides that "petitions must be signed by persons, firms, corporations, owning or controlling 50% or more of the producing acreage of citrus fruit" but the word "control" is not defined in any manner in said Act, and because of the many applications of said word and the varying definitions thereof the Act is vague and indefinite as to the intention of the Legislature as to whom should sign said petitions.

(b) The Act further provides that "the Citrus Commission shall have procured from the producers, shippers or handlers of citrus fruit, *not subject to the provisions* of this

Act, binding agreements to conform thereto and abide by its terms" before the Citrus Commission shall determine the cost to the grower.

The Statute does not define which producers, shippers or handlers of citrus fruit are subject or not subject to the provisions of the Act.

Handlers of citrus fruit, who transact their business outside the State of Florida are certainly not subject to the provisions of said Act, and could not even be known to the Citrus Commission, and it would be impossible for the Citrus Commission to procure agreements from all the handlers of citrus fruit; therefore, the provisions of the said Act could not be put into force and effect by the said Florida Citrus Commission.

XXII.

The Act is further vague, indefinite, uncertain and contrary in that it provides that every contract, agreement, plan or arrangement "* * * shall be held to require that the person, firm, corporation or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production" but provides no penalties whatsoever for violation of said quoted provisions, nor provides any means or method of enforcing the same whatsoever.

The Act likewise provides that "any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production * * * shall" be unlawful and against public policy to that extent but further provides "but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding", so that the entire Act is so vague, indefinite and uncertain that it is impossible to tell who or what transactions are subject to the provisions thereof.

XXIII.

The defendant contends that under the Bond and License Act, copy of which is attached hereto as Exhibit "B", he has the power to and will revoke the licenses of these plaintiffs, and each of them if they do not pay 32¢ to the grower

for each field box of grapefruit received by them for canning purposes.

These plaintiffs allege that the defendant, Commissioner of Agriculture, is without authority whatsoever to revoke the licenses of these plaintiffs or either of them for their failure to comply with the provisions of the Growers' Cost Guarantee Act or the Regulation promulgated thereunder, but that unless restrained by this Honorable Court the said Commissioner will illegally and improperly and without any authority whatsoever, revoke the licenses of these plaintiffs and each of them, and that thereupon the plaintiffs will be forced to stop their businesses or be subject to the heavy fine and imprisonment under Section 13 of the Bond and License Act.

XXIV.

That unless restrained by this Court, defendant will revoke the license of each of these plaintiffs and will thereby deprive these plaintiffs, and each of them, of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

That if the licenses of these plaintiffs are revoked their right to transact their lawful business in the State of Florida will be taken from them, and their property will be further taken in the loss and irreparable damage caused by the revocation of their said licenses.

XXV.

Plaintiff, Florida Grapefruit Canning Company further shows unto the Court that prior to the promulgation of the Regulation by the Citrus Commission, copy of which is attached hereto as Exhibit "C", it had entered into binding contracts with growers of grapefruit in the State of Florida, whereby the growers of grapefruit agreed to furnish to said plaintiff approximately 60,000 field boxes of grapefruit at a price less than 32 cents per field box; that said plaintiff likewise had contracts of sale whereby plaintiff agreed to sell canned grapefruit and grapefruit juice at a price that would have netted to said plaintiff a profit in excess of $3,000.00 over and above the cost of said fruit under the contracts

above referred to, and all additional costs in connection with the processing, canning and shipping thereof.

This plaintiff alleges that by the promulgation of said Regulation it has been unable to accept said 60,000 boxes of grapefruit at the price set forth in said contract, and that it is unable to pay 32¢ a box for grapefruit and process the same, and sell it to the consumer under his contract to said consumer; therefore the said Statute and the promulgation of said Regulation thereunder, have impaired the obligation of his contracts in violation of Article I, Section 10 of the Constitution of the United States.

WHEREFORE, the premises being considered, the plaintiffs pray:

First. That this Court take jurisdiction of this cause and of the parties hereto.

Second. That process of this Court be issued to the defendant, Nathan Mayo, as Commissioner of Agriculture of the State of Florida, under the rules of this Court, requiring the said Defendant to answer this Complaint.

Third. That this Court do grant to the Plaintiffs a temporary restraining order against the said Nathan Mayo, as Commissioner of Agriculture, his successor or successors, assistants, deputies, agent or agents, attorneys, servants, inspectors, employees or other representatives from suspending, revoking or cancelling the licenses of the plaintiffs and each of them, as citrus fruit dealers, and from enforcing or attempting to enforce in any manner or form whatsoever the said Regulation of the said Florida Citrus Commission, dated January 16, 1939, and Chapter 16862 Laws of Florida, 1935, being the Growers' Cost Guarantee Act, or in any manner molesting or interfering with the plaintiffs in the operation of their several canning plants and factories because of their failure to comply with the Regulation of the said Citrus Commission and said Chapter 16862 Laws of Florida, 1935.

Fourth. That after issuance of said temporary restraining order this Court do convene a Three-Judge Court, and after notice of hearing that said Three-Judge Court enter

a temporary injunction to the same effect as said restraining order.

Fifth. That upon final hearing the said Three-Judge Court enter a final order and decree making said injunction permanent.

And for such other and further relief as to the Court shall seem meet.

KNIGHT, THOMPSON & SUTTON,
By G. L. REEVES,
Attorneys for All Plaintiffs.

G. L. REEVES,
Of Counsel,
Tampa, Florida.

STATE OF FLORIDA,
County of Hillsborough:

Before me, the undersigned authority, on this 22nd day of March, A. D., 1939, personally appeared J. Adams Bruce, who, being by me first duly sworn, deposes and says that he is President of Bruce's Juices, Inc., one of the above named plaintiffs; that he is familiar with the contents of the above and foregoing Complaint and that the facts alleged therein are true and correct.

Affiant further says that the Defendant has threatened to suspend his license as well as the licenses of the other plaintiffs unless the plaintiffs abide by the provisions of the Regulation of the Florida Citrus Commission, dated January 16, 1939, and that he has reason to believe that the said Defendant will make good his threat and will revoke his license as well as the licenses of the other plaintiffs, unless enjoined by this Court.

J. ADAMS BRUCE.

Sworn to and subscribed before me this 22nd day of March, A. D. 1939.

CALLOWAY K. TYSON,
Notary Public, State of
Florida at Large.

[SEAL.]

My Commission expires Aug. 8, 1942.

EXHIBIT "D".

Growers' Cost Guarantee Law.

Chapter No. 16862.

Laws of Florida—Acts of 1935.

AN ACT relating to citrus fruit: Prescribing conditions and limitations upon the sale, marketing and processing agreements.

WHEREAS, it is found by the Legislature and hereby declared that the production and distribution of citrus fruit is a paramount industry in Florida upon which the prosperity of the State in a large measure depends; that such fruit and the juices thereof have become and are generally used in great and rapidly increasing quantities, both voluntarily and upon advice of physicians, by people of all classes, ages and conditions; that it is necessary for the reasonable comfort, welfare, and health of the people and in order to build up their strength and vigor that an adequate and dependable supply of high grade citrus fruit be constantly available, and the production, transportation, processing, distribution and sale of citrus fruit in the State of Florida is therefore hereby declared to be a business affecting the public health and interest, that unfair, unjust, destructive, demoralizing, and uneconomic trade practices have been and are continuing to be carried on in the sale and distribution of citrus fruit in this state to the extent that such fruit has been and is continuing to sell in many cases at prices below the cost of production and the constant, dependable and adequate supply of such fruit for sale and consumption is thereby so seriously imperiled as to threaten the break down of the industry; that the present acute economic condition in Florida is in part the consequence of a severe and increasing disparity between the prices of citrus fruit and other commodities; that it is both expedient and necessary to build up the quality and reputation of Florida's citrus fruit in the market and to stabilize the Florida citrus industry and to protect the public and the growers against fraud, deception, and financial loss through

further continuation of unscrupulous practices and haphazard methods in connection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

THEREFORE, in the exercise of the police power of the State for the purpose of protecting and promoting the public health and general welfare,

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

Section 1. This Act shall be known and called the Growers Cost Guarantee Act.

Section 2. The term "Citrus Fruit" as used herein means and includes only the fruits Citrus Grandis, Osbeck, commonly called grapefruit, and Citrus Sinensis, Osbeck, commonly called oranges, and Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

The term "standard packed box" means 1⅗ bushels whether in bulk or in a container.

Section 3. The Commissioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitions signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time to time may make, and after the Citrus Commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the average reasonable cost per standard packed box of producing citrus fruit and every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm,

corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production, to be ascertained by multiplying the said cost per standard packed box as shown by the record of the Commission current at the time the contract, agreement, plan or arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

Section 4. The provisions of this Act shall apply to any one or more of the citrus varieties embraced hereunder as may be determined by the petitions and agreements provided for in the foregoing section.

Section 5. This Act shall become effective immediately upon becoming a law.

Approved June 8, 1935.
Filed in Office Secretary of State June 8, 1935.

EXHIBIT "E".

Bond and License Act.

Chapter No. 16860, Laws of Florida—Acts of 1935 as Amended by Chapter No. 17777, Acts of 1937

AN ACT Relating to the purchase, handling, sale and accounting of citrus fruit grown in the State of Florida; to prevent fraud and deception therein; to provide for the licensing and bonding of citrus fruit dealers; to prescribe certain powers and duties of the Commissioner of Agriculture of the State of Florida in the administration and enforcement of this act; and to prescribe penalties for the violations of the provisions of this Act.

Be it Enacted by the Legislature of the State of Florida:

Section 1. That as used in this Act:

(a) The term "person" means and includes individuals, firms, partnership, association, corporation, and any other business unit.

(b) The term "citrus fruit" means and includes only the fruit Citrus Grandis, Osbeck, commonly called grapefruit, and/or Citrus Sinensis, Osbeck, commonly called Oranges, and/or Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

(c) The term producer means and includes any person engaged in the business of growing and/or producing citrus fruit.

(d) The term "consignor" means and includes any person other than a producer who ships or delivers to any commission merchant, or dealer any citrus fruit for handling, sale or resale.

(e) The term "commission merchant" means and includes any person engaged in the business of receiving any citrus fruit for sale, on commission or for or on behalf of another.

(f) The term "consignment shipper" means and includes any person who contracts with the producer of citrus fruit for the marketing thereof for the sole account and risk of such producer and who agrees to pay such a producer the net proceeds derived from such sale.

(g) The term "cash buyer" means and includes any person who purchases any citrus fruit in Florida from the producer thereof for the purpose of resale.

(h) The term "broker" means and includes any person engaged in the business of negotiating the sale or purchase of any citrus fruit.

(i) The term "agent" means and includes any person, who on behalf of any one citrus fruit dealer, negotiates the consignment or purchase of any citrus fruit.

(j) The term "dealer" means and includes every person other than a producer, consignor, commission merchant, consignment shipper, cash buyer, broker, or agent who in any manner makes or attempts to make money or any other thing of value on any citrus fruit by dealing in the same in any manner whatsoever.

(k) The term "citrus fruit dealer" means and includes every consignor, commission merchant, consignment shipper, cash buyer, broker, agent association, cooperative associatior, and dealer, as herein above defined.

(l) The term "Commissioner" means the Commissioner of Agriculture of the State of Florida.

(m) The term "standard packed box" means one and three-fifths (1⅗) bushels of citrus fruit whether in bulk or in container.

(n) *The term "shipping season" means and includes that period of time commencing July 1 of one year and ending June 30 of the following year.*

NOTE: The italicized portion did not appear in the 1935 Act.

Section 2. That no person shall act as a citrus fruit dealer without having obtained a license as provided in this Act. That any person desiring to engage in the business of citrus fruit dealer in the State of Florida shall make application to the Commissioner for a license. The Commissioner may by regulation prescribe the information to be contained in such application. Upon the filing of the application, and annually thereafter, the applicant shall pay to the Commissioner a fee of Ten Dollars except that where any applicant expects to deal only as an agent, as defined herein, such applicant shall pay the sum of Five Dollars. All such license fees collected hereunder shall be paid by the Commissioner into the State Treasury monthly to the Credit of the General Inspection Fund. Said fees shall be kept in said General Inspection Fund and are hereby appropriated and made available for defraying the expenses incurred in the administration and enforcement of this Act.

NOTE: The following paragraph appeared at the end of Section 2 in the 1935 Act.

"In cases where a sale of citrus fruit is made direct to a purchaser for cash paid at the time of sale, no license shall be required but any agent of the Commissioner shall, if the citrus fruit has been properly inspected, graded and labeled as required by law, issue a certificate to the purchaser reciting that the fruit has been inspected and all requirements of law complied with and that the fruit has been paid for and such certificate shall be accepted in lieu of a license by all agents and employees of the Commissioner. No fee shall be charged for such Certificate."

Section 3. *That before any license is granted by the Commissioner to any person other than an agent as defined in this Act, the applicant therefor must deliver to the Commissioner a good and sufficient cash bond or surety bond executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety, in the amount of Ten Dollars for each one thousand standard packed boxes of citrus fruit that the said applicant intends to deal with during the next twelve months, as set forth in his application up to and including one million standard packed boxes of citrus fruit; provided, however, that no bond shall be less than Five Hundred Dollars in amount nor greater than Ten Thousand Dollars in amount. Said bond shall be in the form approved by the Commissioner and shall be conditioned upon compliance with the provisions of this Act, and upon faithful compliance with the conditions of all contracts, verbal or written, made by the citrus fruit dealer with producers relative to the purchase, handling, sale and accounting of sales of citrus fruit and upon applicant accounting for the proceeds of any citrus fruit contracted for in accordance with the terms of the contracts with producers. Said bond shall be to the Commissioner and his successors in office, in favor of every producer with whom applicant deals in the purchase, handling, sale and accounting of sales of citrus fruit. The aggregate accumulated liability under any such bond shall not exceed the amount named*

therein. Every such bond shall continue in force and effect until ninety days after the termination of the shipping season for which the bond is given. Any producer claiming to be injured or damaged by any act of said citrus fruit dealer, or the Commissioner on behalf of all producers contracting with the said citrus fruit dealer, may maintain an action on said bond against the citrus fruit dealer and the surety named in said bond, or either of them, and any judgment against the citrus fruit dealer, and/or surety in any such action shall include costs.

In cases where liability under and by virtue of any bond given pursuant to the provisions hereof is admitted, without suit, and the amount or amounts admitted to be due are paid to the Commissioner, the Commissioner is authorized and directed to ascertain the amount or amounts due the claimant or claimants who has or have duly filed a claim or claims under and in connection with such bond prior to the expiration of ninety days immediately following the end of the shipping season for which such bond was given, and thereafter the Commissioner shall make distribution of the amount or amounts so paid to him under such bond to the extent that the same may reach in satisfying such claim or claims; provided, however, that where there are two or more claimants who have duly filed claims within the time last aforesaid that aggregate an amount in excess of the amount or amounts held by the Commissioner for distribution, such claimants shall participate in the proceeds of such funds in the hands of the Commissioner only on a pro rata basis, and no one of such claimants shall receive any preference over the others by reason of having filed his claim prior to the filing of the claims of the others.

NOTE: In the 1935 Act, Section 3 read as follows:

"Section 3. That before any license is granted by the Commissioner, the applicant therefor must deliver to the Commissioner a good and sufficient cash bond or surety bond executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety, in the amount of Ten Dollars for each one thousand standard packed boxes

of citrus fruit that the said applicant intends to deal with during the next twelve months, as set forth in his application, up to and including five hundred thousand standard packed boxes of citrus fruit; provided however, that no bond shall be less than One Hundred Dollars in amount nor greater than Five Thousand Dollars in amount. Said bond shall be in the form approved by the Commissioner and shall be conditioned upon compliance with the provisions of this Act and upon faithful compliance with the conditions of all contracts, verbal or written, made by the citrus fruit dealer with producers and/or any person contracting with the citrus fruit dealer relative to the purchase, handling, sale and accounting of sales of citrus fruit and upon applicant accounting for the proceeds of any citrus fruit contracted for in accordance with the terms of the contracts with producers. Said bond shall be to the Governor of the State of Florida and his successors in office, in favor of every person with whom applicant deals in the purchase, handling, sale and accounting of sales of citrus fruit. The aggregate accumulated liability under any such bond shall not exceed the amount named therein. Every such bond shall continue in force and effect until notice of the termination thereof is given by registered mail to the Commissioner, and every such bond shall set forth such fact. Any person or producer claiming to be injured or damaged by any act of said citrus fruit dealer, or the Commissioner on behalf of all producers and/or persons contracting with the said citrus fruit dealer may maintain an action on said bond against the citrus fruit dealer and the surety named in said bond, or either of them, and any judgment against the citrus fruit dealer and/or surety in any such action shall include costs. No bond shall be required of any purchaser who pays cash for the fruit which he buys at the time of the sale."

Section 4. That it shall be unlawful in, or in connection with, any transaction relative to the purchase, sale and accounting of sale and handling of citrus fruit:

1. For any citrus dealer to make or exact any fraudulent charge to and/or from any person.

2. For any citrus dealer to reject or fail to deliver in accordance with terms of the contract without reasonable cause any citrus fruit bought or sold or contracted to be bought or sold by such citrus fruit dealer.

3. For any citrus fruit dealer to discard, dump or destroy, without reasonable cause any citrus fruit received by such citrus fruit dealer.

4. For any citrus fruit dealer to make, for a fraudulent purpose any false or misleading statement concerning the condition, quality, quantity, or disposition of or the condition of the market for, any citrus fruit which is received by such citrus fruit dealer or bought or sold or contracted to be bought or sold by such citrus fruit dealer; or the purchase or sale of which is negotiated by such citrus fruit dealer; or to fail or refuse truly and correctly to account promptly in respect of any such transaction in any such citrus fruit to the person with whom such transaction is had.

5. *For any citrus fruit dealer to knowingly buy, sell, receive, process or handle stolen citrus fruit.*

NOTE: The italicized portion did not appear in the 1935 Act.

Section 5. Whenever an applicant has paid the prescribed fee, the Commissioner shall issue to such applicant a license which shall entitle the licensee to do business as a citrus fruit dealer unless and until it is suspended or revoked by the Commissioner in accordance with the provisions of this Act but said license shall automatically terminate unless the annual fee is paid within thirty days after notice has been mailed that payment is due.

Section 6. That if any citrus fruit dealer violates any provisions of this Act he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation. Such liability may be enforced either (1) by complaint to the Commissioner, as hereinafter provided, or (2) by suit in any Court of competent

jurisdiction; but this Section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies.

Section 7. *That any person complaining of any violation of any of the provisions of this Act by any citrus fruit dealer during any shipping season may at any time prior to the expiration of ninety days immediately following the end of such shipping season* apply to the Commissioner by petition, which shall briefly state the facts, whereupon, if in the opinion of the Commissioner the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commissioner to the citrus fruit dealer, who shall be called upon to satisfy the complaint or to answer it in writing within a reasonable time to be prescribed by the Commissioner. After an opportunity for hearing on a complaint the Commissioner shall determine whether or not the citrus fruit dealer has violated any of the provisions of the Act. If after hearing on a complaint made by any person under this Section the Commissioner determines that the citrus dealer has violated any provision of this Act, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If any citrus fruit dealer does not comply with an order for the payment of money within the time limited in such order, the complainant or any person for whose benefit such order was made, may, *within ninety days* from the date of the order file in any Court of competent jurisdiction a petition or declaration setting forth briefly the cause for which he claims damages and the order of the Commissioner in the premises. Such suit in such Court shall proceed in all respects like other civil suits for damages, except that the findings and order of the Commissioner shall be *prima facie* evidence of the facts therein stated, and the petitioner or plaintiff shall not be liable for costs in such Court nor for costs in any subsequent stage of the proceedings unless they accrue upon his appeal. If the

etitioner or plaintiff finally prevails he shall be allowed reasonable attorney's fee to be taxed and collected as a art of the costs of the suit.

NOTE: This italicized portion read as follows in the 935 Act:

"That any person complaining of any violation of any provisions of this Act by any citrus fruit dealer may at any time within nine months after the cause of action accrues apply to the Commissioner by petition, which, etc."

* * * NOTE: This italicized portion reads as follows n the 1935 Act:

"* * * within one year * * * etc."

Section 8. That whenever the Commissioner determines hat any citrus fruit dealer violated any of the provisions f this Act or has violated any of the provisions of any ther law of the State of Florida governing and applicale to citrus fruit dealers as herein defined, he may publish he facts and circumstances of such violation and/or by rder, suspend the license of such offender for a specific eriod, or revoke the same or make such other appropriate rder as he may deem just and proper, and any such order hall specify the effective date thereof and any order other han one suspending or revoking a license shall autoatically suspend such license until said order is complied ith. That any action of the Commissioner with reference o the revocation or suspension of any license granted under the provisions of this Act, may be reviewed by any ourt of competent jurisdiction.

Section 9. That every citrus dealer shall make and keep correct record showing in detail the following with refernce to the purchase, handling, sale and accounting of sale f citrus fruit handled by him, namely:

(a) *The name and address of the producers or other persons from whom the citrus fruit was procured, and if same*

was procured from some other than a licensed handler, the name and address of the producer of said fruit.

NOTE: The italicized portion read as follows in the 1935 Act:

(a) The name and address of the producers.

(b) The date citrus fruit is received and the amount thereof, and the purchase price paid therefor if purchased for the purpose of resale.

(c) The condition of such citrus fruit upon receipt by the citrus fruit dealer.

(d) If the citrus fruit is handled on consignment for the account of the producer, the date of sale and the selling price.

(e) An itemized statement of the charges to be paid by the producer in connection with any sale.

(f) A detailed statement of all claims made by producers against the citrus fruit dealer, a copy of each when received to be certified to and filed with the Commissioner.

(g) A copy of the record and account of sales of citrus fruit handled on consignment and/or commission shall be delivered to the producer upon the consummation of the sale, together with all moneys received by the citrus fruit dealer in payment for such transactions made upon account of the producer, less the agreed commission and other charges which must be separately itemized, and payment and accounting must be made by said citrus fruit dealer to the producer within fifteen days after said citrus fruit dealer received the money in payment of said citrus fruit unless otherwise specified in contract between citrus fruit dealers and *producer.*

NOTE: The word "producer", italicized above, read "grower" in the 1935 Act.

Section 10. That in the investigation of complaints under this Act the Commissioner, or his duly authorized agents, shall have the right to inspect such accounts, records, and

memoranda of any citrus fruit dealer as may be required for the determination of any such complaint. If any such citrus fruit dealer refuses to permit such inspection, the Commissioner may publish the facts and circumstances and/or by order suspend the license of the offender until permission to make such inspection is given.

Section 11. That the Commissioner, or any officer or employee designated by him for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, receive evidence and require by subpoena the attendance and testimony of witnesses and the production of such accounts, records and memoranda as may be material for the determination of any complaint under this Act. In case of disobedience to a subpoena of the Commissioner, or any of his officers or employees, may invoke the aid of any Court of competent jurisdiction in requiring the attendance and testimony of witnesses and the production of accounts, records and memoranda and any such Court may in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring the person to appear before the Commissioner, or his agents or employees or to produce accounts, records, and memoranda as so ordered, or to give evidence touching any matter pertinent to any complaint and any failure to obey such order of the Court shall be punished by the Court as a contempt thereof.

Section 12. That the commissioner may make such rules, regulations and orders as may be necessary to carry out the provisions of this Act and may cooperate with any department or agency of the United States Government.

Section 13. That any person who acts as a citrus fruit dealer as defined in this Act without a license, or having a license, violates or aids in the violations of any provision of this Act, or any person who represents himself as a citrus fruit dealer but who is not a citrus fruit dealer as defined in this Act, shall for each and every offense be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not exceeding $1000.00 or by imprisonment in the county jail for more than six months or by both

such fine and imprisonment in the discretion of the Court. Civil suits and criminal prosecutions arising by virtue of any of the provisions of this Act may be instituted in the County where the said citrus fruit was received by the citrus fruit dealer, or in the County in which the principal place of business of such citrus fruit dealer is located within the State of Florida, or within the County in which the violation of this Act occurred, or if such violation occurs in more than one county, then within any county in which such violation of this Act occurred.

Section 14. *That the several Circuit Courts of the State of Florida, sitting in Chancery, are hereby vested with jurisdiction specifically to enforce and to enjoin and restrain any citrus fruit dealer from violating, the provisions of this Act, or of any rule, regulation or order made by the Commissioner pursuant to this Act in any proceeding brought by the Commissioner in any of said Circuit Courts; and in any such proceeding it shall not be necessary for the Commissioner to allege or prove that an adequate remedy at law does not exist.*

NOTE: The above Section did not appear in the 1935 Act.

Section 15. That it shall be the duty of each state and/or county law enforcement officer to make arrests for violation of this Act when notified of such violation by the Commissioner of Agriculture, or his authorized agent, inspector or representative.

Section 16. That this act shall be liberally construed and if any part or portion thereof be declared invalid, or the application thereof to any person, circumstance or thing is declared invalid, the validity of the remainder of this Act and/or the application thereof to any other person, circumstance or thing shall not be affected thereby and it is the intention of the Legislature to preserve any and all parts of said Act if possible.

Section 17. That all laws or parts of laws in conflict herewith and the same are hereby repealed.

Section 18. That this Act shall take effect immediately upon its passage and approval by the Governor, or upon becoming a law without such approval.

EXHIBIT "F".

Resolution & Order.

WHEREAS, Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, by and with the consent and advice of Honorable Fred P. Cone, Governor of the State of Florida, has by proclamation dated the 13th day of January, A. D. 1939, declared the existence of a State emergency in the citrus industry, under authority of Chapter 16862, Laws of Florida, Acts of 1935, known as the Grower's Cost Guarantee Law; and

WHEREAS, petitions signed by persons, firms, corporations and associations, which this Commission finds own or control 50% or more of the producing acreage of citrus fruit and 50% or more of the producing acreage of grapefruit in the State of Florida, have been presented requesting the Florida Citrus Commission to determine and record in permanent form the average reasonable cost per standard packed box of producing grapefruit; and

WHEREAS, the Florida Citrus Commission has determined that all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said act; and,

WHEREAS, the Florida Citrus Commission, based upon said proclamation of the Commissioner of Agriculture and the Governor of Florida, and upon said petitions, having proceeded as authorized and required by said Chapter 16862, Laws of Florida, Acts of 1935, hereby determines and records in permanent form the average reasonable cost per standard packed box of producing grapefruit to be thirty-two (32¢) cents for the citrus fruit season 1938-39;

NOW, THEREFORE, the Florida Citrus Commission does hereby find, determine and order that the average reasonable cost per standard packed box of producing grapefruit is thirty-two (32¢) cents and that said price be recorded in permanent form for the season 1938-39 and that every contract, agreement, plan or arrangement with the grower by or under which his grapefruit shall be bought, marketed or processed shall be held to require that the person, firm, corporation or association buying, marketing or processing

said grapefruit shall in any event pay the grower said cost of production as herein ordered and as provided in Chapter 16862, Laws of Florida, Acts of 1935.

The foregoing resolution and order are unanimously adopted and promulgated by the Florida Citrus Commission in open meeting duly assembled in Lakeland, Florida, on this the 16th day of January, A. D., 1939, and shall become effective at 12:01 a. m. Friday, January 20th, A. D. 1939.

FLORIDA CITRUS COMMISSION,
By JOHN MAXCY, *Chairman.*

Attest: Chas. F. Chastain, *Secretary.* (Seal.)

EXHIBIT "G".

[Title omitted]

Comes now the above named plaintiffs, and with leave of Court amends their complaint heretofore filed in this cause by adding thereto a paragraph to be known as Paragraph XXIIIA to read as follows:

"XXIII-A. Plaintiffs further allege by reason of the facts and circumstances herein alleged the Statute under attack and the Resolution and Order of the Florida Citrus Commission issued thereunder, violates the Constitution of the United States in that they impair the obligations of the contracts of these plaintiffs and deny, impair and restrict the right of the plaintiffs to freedom of contract as guaranteed by the Constitution of the United States; they abridge the rights of personal liberty of these plaintiffs, and arbitrarily interfere with the private business of these plaintiffs and prohibit the lawful occupations of these plaintiffs, and impose unreasonable and unnecessary restrictions thereon, to the extent that they violate the Constitution of the United States; the said Statute and Resolution violating the Fourteenth Amendment of the Constitution of the United States, as well as Article 1, Section 10 thereof.

JOHN B. SUTTON,
G. L. REEVES,
Attys. for Plaintiffs.

STATE OF FLORIDA,
County of Orange, ss:

Before me, the undersigned authority, personally appeared C. E. Lindsey, who being by me first duly sworn, deposes and says that he is President of the Lakeland Highlands Canning Company, one of the plaintiffs in the above cause; that he has read the above and foregoing amendment, and that the same is true and correct.

C. E. LINDSEY.

Sworn to and subscribed before me this 10th day of April, A. D. 1939.

JULIAN A. BLADE,
Deputy Clerk.

Presented July 3rd, 1939.

ALEXANDER AKERMAN,
Judge.

(2965)

FILED
DEC 28 1939
CHARLES CLINTON KNOPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 270

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

LAKELAND HIGHLANDS CANNING CO., INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR APPELLANTS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 270

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

LAKELAND HIGHLANDS CANNING CO., INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court for the Southern District of Florida appears in the Record, pp. 76 to 81, and is reported in 28 Fed. Supp. 44.

JURISDICTION

The order or decree of the District Court granting the motion for interlocutory injunction was entered and filed April 28, 1939 (R. 75). The opinion of the District Court expressing the reasons for the granting of the interlocutory

injunction, and holding unconstitutional the State law involved, was dated April 13, 1939 and filed May 3, 1939 (R. 76 to 81). Petition for appeal was presented July 3, 1939 and filed July 7, 1939 (R. 86-87). The appeal was allowed on July 3, 1939 and the Order allowing same filed July 7, 1939 (R. 90-91). Probable jurisdiction was noted by this Court on October 9, 1939.

The jurisdiction of this Court is conferred by the Act of March 4, 1913 (c. 160, 37 Stat. 1013) as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938); Judicial Code, Section 266; Title 28, Section 380, U. S. Code. See also Rule 72 of the rules of civil procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934, Ch. 651.

Claims Advanced and Rulings Made in Lower Court

A. Contentions of Appellees in Lower Court

Appellees here, as plaintiffs in the District Court, contended that Chapter 16,862, Laws of Florida, Acts of 1935, known as the Growers' Cost Guarantee Act (set out in full herein in the appendix, pp. 118 to 120, was unconstitutional and void for the following reasons:

(1) Said Act was discriminatory as against plaintiffs because the Act did not apply to cooperative canning organizations or to growers who can their own grapefruit (R. 5).

(2) The Act was unreasonable, arbitrary and vague, and deprived plaintiffs of their property rights without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution (R. 14, 15, 16, 35).

(3) The Act imposed a burden on, and directly interfered with, interstate commerce in violation of Article I, Section 8 (3), of the Federal Constitution (R. 14).

(4) The Act impaired the obligation of plaintiffs' contracts in yiolation of Article I, Section 10, of the Federal Constitution (R. 16-17, also 35).

Appellees further contended in the lower court that the Regulation promulgated by the Florida Citrus Commission pursuant to said Act (which regulation is set out in full herein in the appendix, pp. 120 to 122) was unconstitutional and void for the following reasons:

1st. The Regulation was discriminatory in like manner as the Act (R. 5).

2nd. The Regulation was arbitrary, capricious, unreasonable, unfair, inequitable and confiscatory and constituted a denial of property rights of plaintiffs without due process of law (R. 13, 35).

3rd. The Regulation impaired the obligation of plaintiffs' contracts in violation of Article I, Section 10, of the Federal Constitution (R. 17-35).

Appellees further contended in the lower court that without regard to the constitutionality of the Act or Regulation, the Regulation was invalid and unenforceable for the following reasons:

(1) The Florida Citrus Commission did not have filed before it, at the time the Regulation was passed, petitions of 50% or more of owners of producing acreage of grapefruit in Florida (R. 11-12).

(2) The determination by the Florida Citrus Commission of the requisite percentage of owners of producing acreage of grapefruit in Florida was not based upon the proper surveys as specified in the Act (R. 12).

(3) When the Regulation was passed the Florida Citrus Commission had not procured from handlers of grape-

fruit, not subject to the Act, binding agreements to conform thereto (R. 12).

B. Rulings Made by Lower Court

The District Court in its opinion held the Act unconstitutional and void for the following reasons:

1. The Act violated the due process clause of the Fourteenth Amendment (R. 78-80).

2. The Act discriminated against plaintiffs and in favor of cooperative canning corporations (R. 80).

3. The Act was arbitrary and prejudicial (R. 80).

The District Court further held that, without regard to the constitutionality of the Act, the enforcement of the Regulation should be enjoined because:

1. There was no proof in the record that the Florida Citrus Commission had secured from handlers of grapefruit, not subject to the Act, their consent and agreement to conform to the Regulation.

Cases Sustaining Jurisdiction

The following cases are believed to sustain the jurisdiction of the Supreme Court: *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458; *Connolly* v. *Union Sewer Pipe*, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679; *Savage* v. *Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182; *Polk Company* v. *Glover, etc.*, 305 U. S. 5, 59 S. Ct. 15, text 17, — L. Ed. —; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 55 S. Ct. 187, 79 L. Ed. 281; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 55 S. Ct. 7; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 57 S. Ct. Rep. 578; *Nebbia* v. *People of the State of New York*, 291 U. S. 502, 54 S. Ct. Rep. 505; *Milk Control Board of Penn-*

sylvania v. *Eisenberg Farm Products*, 306 U. S. 346, 59 S. Ct. 528; *Sligh* v. *Kirkwood*, 237 U. S. 52, 35 S. Ct. Rep. 501; *Townsend* v. *Yeomans*, 301 U. S. 441, 57 S. Ct. Rep. 842; *Barney* v. *City of New York*, 193 U. S. 430, 25 S. Ct. 502; *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 80 L. Ed. 1135.

QUESTIONS PRESENTED

For convenience of the Court the questions presented on this appeal may be stated as follows:

1. May a statutory three-judge District Court, before the essential facts have been finally determined and before the issues have even been made up, proceed to declare unconstitutional a State regulatory Act, especially when the District Court in making such adjudication considers the testimony, largely ex parte, submitted at the hearing upon motion for interlocutory injunction?

2. Was the proper showing made by Appellees in the court below as to the amount involved in the controversy so as to invoke jurisdiction of the Federal Court to proceed to determine the merits of the case?

3. Do the Act and Regulation in their effect operate to directly interfere with, or to unduly burden, interstate commerce?

4. Is the Act discriminatory as against Appellees?

5. Are the Statute and Regulation so vague, arbitrary, unreasonable and confiscatory as to deprive appellees of their property without due process of law in contravention of the Fourteenth Amendment?

6. Should the enforcement of the Regulation be enjoined by a Federal District Court for supposed non-performance by the Commission of certain conditions precedent to the

issuance of the Regulation, especially where the Regulation on its face shows such performance and there is no proof to the contrary before the District Court?

7. Should the three-judge court have granted the interlocutory injunction?

STATUTES AND REGULATIONS INVOLVED

The State law involved in this cause is Chapter 16,862, Laws of Florida, Acts of 1935, adopted at the session of the legislature of the State of Florida of 1935, known as the Growers' Cost Guarantee Act, contained in Volume 1, General Laws of Florida, 1935, and is set out in full in the appendix, pp. 118 to 120. The Regulation of the Florida Citrus Commission, promulgated pursuant to said Act, also involved in this cause, is likewise set forth in full in the appendix, pp. 120 to 122.

Another State law incidently involved in this cause is Chapter 16,860, Laws of Florida, Acts of 1935, as amended by Chapter 17,777, Laws of Florida, Acts of 1937, known as the Bond & License law, contained in the Laws of Florida of those respective years, and is likewise set out at length in the appendix, pp. 122 to 131.

STATEMENT OF THE CASE

We will give the Court a brief resumé of the progress of the case in the court below, to be followed with an analysis of the Statutes and Regulation involved, the pleadings, the evidence, and the rulings made.

Complaint was filed by appellees here, as plaintiffs in the court below, on March 23, 1939, in the United States District Court for the Southern District of Florida, praying for injunction restraining Nathan Mayo, as Commissioner of Agriculture for the State of Florida, one of appellants

here and sole defendant in the court below, from enforcing or attempting to enforce the Growers' Cost Guarantee law and the Regulation of the Florida Citrus Commission promulgated on January 16, 1939, in pursuance of said Act. Injunction was also prayed restraining said Commissioner from revoking or suspending the licenses of plaintiffs as citrus fruit dealers under the Bond & License Act (R. 1-17-20, *et seq.*). Upon the filing of complaint the District Judge, on March 23, 1939, issued temporary restraining order in accordance with the prayer of the complaint, pending a hearing upon "motion for temporary injunction" (R. 32-33).

On March 28, 1939, upon proper petition, order was entered by the District Judge allowing the Florida Citrus Commission, a body corporate created under Act of the State legislature to intervene and be joined as a party defendant in the cause (R. 85-86).

A three-judge District Court was convened at Orlando, Florida, on April 10, 1939, composed of Judge Leon McCord of the Fifth Circuit Court of Appeals and Judge Robert T. Ervin, of the Southern District Court of Alabama and Judge Alexander Akerman, the resident District Judge where the suit was filed (R. 34-35). The three-judge court was convened "for the hearing and determination of the application for temporary injunction" (R. 35). Plaintiffs requested the right to introduce oral testimony and the court stated it would relax the rule to permit same (R. 45). The hearing was somewhat irregular, facts even being stated to the court by counsel for plaintiffs (R. 48, *et seq.*). Testimony was very brief. Two witnesses testified for plaintiffs. Six affidavits were submitted by defendants. The court observed that plaintiffs had not raised the question of "want of due process" (R. 69), whereupon plaintiffs, by permission of court and on the same day, filed an

amendment to the complaint (R. 35-36). The court thereupon gave plaintiffs five days from that date to file further affidavits and the defendants five days thereafter to file counter-affidavits (R. 69). Plaintiffs, on April 15, 1939, filed two affidavits (R. 71-74) and one certified copy of a resolution of the Florida Citrus Commission (R. 69-70).

On April 28, 1939, order was filed by the three-judge court granting the motion for interlocutory injunction and continuing in force the restraining order originally issued by the District Judge "until the final hearing in this case or until the further order of the Court" (R. 75-76). Said order recited that injunction was granted "after hearing the evidence and argument of counsel and for the reasons to be expressed in an opinion to be filed later" (R. 75). On May 3, 1939, the court filed its opinion (R. 76-81) which appears on its face to have been drawn up and signed on April 13, 1939 (R. 81). The opinion held the Growers' Cost Guarantee Act unconstitutional on several grounds, and in addition held that enforcement of the Regulation should be enjoined because of failure of the Commission to follow certain procedural requirements (R. 80).

At the time the order granting interlocutory injunction and the opinion of the court were filed, no pleadings had been filed on behalf of the Commissioner of Agriculture, or the Florida Citrus Commission, sole defendants in the case.[1] Thus the three-judge court struck down as unconstitutional a State Act and a Regulation promulgated thereunder before any issues were made up, before either of defendants had filed pleadings to the complaint, before there had been an orderly reception of evidence upon issues joined, before there had been any final determination of essential facts,

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[1] We may ignore the Florida Citrus Growers, Inc., which filed petition to intervene but never procured order allowing same (R. 74-75).

and even before all of the evidence had been adduced upon the motion for interlocutory injunction.[2]

It was not until May 17, 1939, that the defendants filed answer to the complaint, which answer incorporated three special defenses (R. 81) and a general defense consisting of a reply to the essential facts contained in the complaint (R. 82-85).

On July 7, 1939, the defendants procured order allowing appeal from the order and opinion of the three-judge court (R. 86-87, 90-91). The assignment of errors urged as error the several rulings made by the court on the merits of the case, the jurisdiction of the three-judge court to proceed at all, and the propriety of the procedure adopted by the court in pronouncing its judgment on the validity of the Act (R. 87-90).

With the foregoing as a synopsis of how the case proceeded in the lower court, we will analyze in more detail the Statutes and Regulation involved, the pleadings, evidence and rulings made, as follows:

The Statutes and Regulation Involved.

(*a*) *The Growers' Cost Guarantee Act* (R. 18-20). This Act contained a preamble setting forth certain findings of fact made by the legislature. The legislature found and declared that the production and distribution of citrus fruit was such a paramount industry in Florida that the prosperity of the State was dependent thereon in a large measure; that citrus fruit and juices were of great value to all classes of people and were prescribed by physicians; that it was necessary in the interest of the welfare and health of the

---

[2] This is so because the Court wrote its opinion holding the Act unconstitutional on April 13, 1939 (R. 81), which was two days before plaintiffs filed additional affidavit evidence (R. 69-74) and seven days before defendants were to file counter-affidavits if desired (R. 69).

people that an adequate and dependable supply of citrus fruit be always available; that the production and handling of citrus fruit in Florida was a business affecting the public health and interest; that unfair and destructive trade practices had been and were being carried on in the sale and distribution of citrus fruit in Florida to such extent that fruit in many cases had been and was selling at prices below the cost of production, which fact seriously imperiled a dependable and adequate supply of the fruit; that the industry because of the foregoing facts was threatened with a break down; that the acute economic condition in Florida was in part due to the increasing disparity between the prices of citrus fruit and other commodities; that it was necessary to build up the quality and reputation of citrus fruit in the market and to stabilize the industry and to protect both the public and the growers against fraud and financial loss through further continuation of unscrupulous practices in the marketing of citrus fruits and to that end, to assure the grower of a return for his fruit at least equal to the cost of production; and that the Act was necessary for the purpose of protecting and promoting the public health and general welfare. The Act empowers the State Commissioner of Agriculture, by and with the consent and advice of the Governor, to declare the existence of a State Emergency in the Citrus Industry. Thereupon a petition signed by producers of at least 50% of the producing acreage of citrus fruit in Florida, requesting the fixing of the cost of production, is filed with the Florida Citrus Commission. The Commission also procures from producers or handlers of citrus fruit, not subject to the Act, agreements to conform to such Regulation. The Florida Citrus Commission is then directed to determine and record in permanent form annually the average reasonable cost per standard packed box of citrus fruit. After this is done, the Act declares that all agreements with the citrus grower under

which his fruit is bought, marketed or processed shall pay to the grower his cost of production as determined by the Commission. The Act declares unlawful any attempt by contract to preclude the grower from receiving such cost of production.

(*b*) *Regulation of the Florida Citrus Commission* (R. 31-32). This Regulation, unanimously adopted by the Florida Citrus Commission in open meeting on January 16, 1939, to become effective on January 20, 1939, recited that the State Commissioner of Agriculture, under authority of the Growers' Cost Guarantee law, and with the advice and consent of the Governor of Florida, had on January 13, 1939, declared the existence of a State emergency in the citrus industry. The Regulation recites compliance with certain conditions imposed upon the Commission in promulgating the Regulation.

The Regulation thereupon states that the Commission did find, determine and order that such cost of production for a standard packed box of grapefruit was 32¢ for the season 1938-39. The Regulation declared that all contracts with the grower of grapefruit shall be held to require payment to the grower of such cost of production.

(*c*) *The Bond and License Act* (R. 20). It will be unnecessary to analyze in detail the provisions of this Act. Suffice to refer only to those provisions pertinent to this case. The Act provides generally that all persons, firms, associations and corporations, dealing with growers of citrus fruit in the purchase, marketing and handling of fruit in Florida, must obtain from the State Commissioner of Agriculture a license as a citrus fruit dealer. Such license issues upon application therefor, the payment of a nominal fee, and the posting of a bond with the Commissioner in an amount commensurate with the business to be done by the dealer. The bond is not less than $500.00 nor more than $10,000.00.

The bond provides indemnity for the failure of such dealer to live up to his contracts with growers in the purchase of citrus fruit. Certain standards of business conduct and ethics on the part of the dealer with the grower are set forth in the Act and certain practices on the part of the dealer in his relation with the grower are declared unlawful. The Act then empowers the Commissioner, when he determines that any citrus fruit dealer has violated that Act or any other law of Florida applicable to citrus fruit dealers, to suspend or revoke the license of the dealer which action is reviewable by the Courts.

The Pleadings[3]

(a) *The Complaint*

Plaintiffs were listed as ten corporations and one partnership, all engaged in the business of canning citrus products produced and grown in Florida (R. 1-3). The only defendant named was Nathan Mayo, as Commissioner of Agriculture of Florida (R. 3). There was a general allegation that the cause involved a controversy in excess of $3,000.00 and arose under the Federal Constitution (R. 3). The history of the grapefruit canning industry was portrayed. The rapid progress of the industry was vividly set forth. It was alleged that the canning of grapefruit and grapefruit juice had developed into one of the principal industries of Florida, that the pack of canned grapefruit sections had increased from less than 900,000 cases in

[3] The complaint and amendment thereto on behalf of plaintiffs were the only pleadings filed in the cause at the time of the three-judge hearing and at the time of the order and opinion granting the interlocutory injunction and declaring the Act involved unconstitutional. The only pleading ever filed on behalf of defendants or either of them, was their joint and several answer filed on May 17, 1939 (R. 81), which was subsequent to the filing of the opinion and order aforesaid. The answer has been included in the record before this Court, but will not be gone into or considered in this brief because it was not before the three-judge court.

the season of 1931-32 to almost three and a half million cases in the season of 1937-38; that the pack of canned grapefruit juice had increased from about 230,000 cases in the season of 1931-32 to over three and one-third million cases in the season of 1937-38; and that the pack of canned combination juices (being a mixture of different citrus juices) had increased from about 80,000 cases in the season of 1935-36 to almost 600,000 cases in the season of 1937-38 (R. 3). It was alleged that during the five years next preceding the filing of the complaint the canning industry in Florida had utilized over twenty-four million boxes of grapefruit (R. 4). The flow of grapefruit into the canning field was graphically shown in the percentage of the annual grapefruit crop which during those five years had found its outlet in that field (R. 4). In the season of 1933-34 such percentage was a little over 21%; in the season of 1934-35 the percentage was 36½%; in the season of 1935-36 the percentage was 32%; in the season of 1936-37 the percentage was over 37%, and in the season of 1937-38 the percentage was almost 41½% (R. 4). It was alleged that the plaintiffs had packed, over the three year period preceding the filing of the complaint, over 60% of the total pack of processed grapefruit in Florida (R. 4). It was estimated that the pack for the then current season of 1938-39 would far exceed any previous annual pack in the history of the industry in Florida (R. 4). It was alleged that each of plaintiffs had been offered large volumes of grapefruit by growers in Florida at prices ranging from 12¢ to 25¢ per field box (R. 5). It was said that the plaintiffs and each of them, except for the operation of the Act and Regulation involved, could and would have bought said grapefruit and processed and sold the same "to the different distributors[4] at a profit far in excess of $3,000.00" (R. 5).

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[4] Just who the "different distributors" were is not stated.

It was alleged that many individual growers owned canning plants where they could can their own grapefruit without the burden of the Act, and that many other growers canned their grapefruit "through cooperative organizations to which the defendant contends the price law does not apply" (R. 5). It was alleged that "by reason of the foregoing facts" canned grapefruit was being offered for sale at prices which would not net the grower 32¢ per box (R. 5). The Act was thereupon alleged to be discriminatory because it "attempts to force these plaintiffs to pay a minimum price for their raw products while permitting others to operate in competition to these plaintiffs unrestrained by the provisions of said Law and Regulations" (R. 5). It was said that plaintiffs were threatened with loss of their property without due process of law, to the irreparable damage to each of over $3,000.00 (R. 5).

It was alleged that canned grapefruit sections and canned grapefruit juice processed in Florida was widely distributed in interstate commerce and that over 99% of such products of plaintiffs went through such channels (R. 5).

It was alleged that the canning season extended each year from about November 1st to the following June or July and that in preparing for the canning season it was necessary that cans and labels be ordered, labor secured, contracts made for the purchase of fruit, and factory operations planned generally (R. 6). It was also said to be the commercial practice for sales orders for the finished product to be secured in advance of the season (R. 6).

Competition from other areas was elaborately dwelt upon (R. 6-7). Competition between citrus juices and other fruit juices, such as tomato juice and pineapple juice, was also dwelt upon (R. 7). It was said that "any impediment upon the ready purchasing of grapefruit juice" would cause consumption to shift to other juices and thereby diminish

the flow of packed citrus juices into interstate commerce from Florida (R. 7). It was alleged that canned grapefruit juice from Texas was currently being offered at from 42¢ to 45¢ "per doz. f.o.b. Texas" and these plaintiffs would be unable to meet such competition (R. 7). Upon information and belief it was alleged that "the different companies canning in the State of Texas" were then buying grapefruit at from 12¢ to 20¢ per field box (R. 7). It was alleged that for several years the packed Florida product enjoyed a slightly higher price than the Texas canned product, but that if plaintiffs had to submit to the Act they could not compete with the Texas product "and the canning industry of Florida will suffer an irreparable loss and each of these plaintiffs will thereby suffer damages in excess of $3,000.00" (R. 7).

The total investments of plaintiffs in their plants and equipment was alleged as over $2,000,000, and over $100,000 for each plaintiff (R. 8). It was alleged that plaintiffs employed about 5000 people with a weekly pay-roll of about $100,000 (R. 8). It was alleged that Florida during the current season was faced with the largest grapefruit production in history, approximating 21,000,000 boxes, and that because of the Act and Regulation involved it had been impossible for plaintiffs to operate their factories and pay to the grower his cost of production as fixed by the Commission (R. 8). It was alleged that because of this latter fact there had been about 2,000,000 less cases packed so far during the current season than in the preceding season, which was causing the raw product to decay and rot "because the growers, who did not own a canning plant or belong to a cooperative were unable to sell their fruit" (R. 8). It was said that many growers were willing and anxious "to dispose" of their fruit to plaintiffs "at whatever price market conditions will warrant", but that plaintiffs were unable to buy the fruit because of the Act (R. 8).

It was alleged that it was necessary for plaintiffs to carry many employees during the non-operating period annually, and that if they were forced to close their plants because of the Act involved, each of them would suffer loss in excess of $3,000.00 "in overhead costs, salaries, etc." (R. 9).

It was said that, because of the Act and Regulation involved, plaintiffs were and would be unable to "take care of" their outside dealers and distributors who had over a period of years built up good will for various brands of canned products of plaintiffs and that damage in excess of $3,000.00 to each plaintiff would be suffered in loss of "good will and trade marks" (R. 9-10). It was said that such loss of good will could only be regained "at a tremendous cost and expense" to plaintiffs (R. 10). It was said that competition from other canned juices made it necessary that canned citrus products be kept continuously on the market (R. 10). It was alleged that in order to meet the cost of production fixed by the Commission, plaintiffs would have to receive "62¢ and 70¢ per doz. for grapefruit juice, whereas the Texas product was then being quoted at 42¢ per doz." (R. 10).

It was alleged that "some of the cooperative associations" were offering the canned product at a price which would not leave a sufficient margin to pay the grower 32¢ per box (R. 10-11). It was said that plaintiffs would not thereby be able to compete with the cooperative organizations and that plaintiffs would lose their "large investments" exceeding $3,000 to each plaintiff (R. 11).

It was alleged that the Florida Citrus Commission, when it promulgated the Regulation, did not have before it petitions signed by the requisite owners of producing acreage of citrus fruit in Florida (R. 11-12); that the Commission did not determine the percentage of acreage on the basis

of proper surveys (R. 12); and that the Commission did not procure from producers or handlers not subject to the Act proper agreements to conform to the Regulation (R. 12). Such deficiencies of procedure on the part of the Commission were said to render the Regulation null and void (R. 11-12). The Regulation was also attacked because the cost of production was determined by the Commission "as the result of experiments on certain isolated groves by certain persons who were not members of the Florida Citrus Commission" (R. 13). It was denied that 32¢ was the proper cost of production per standard packed box (R. 13). These considerations, it was alleged, rendered the Regulation arbitrary, unfair and confiscatory, and to amount to the taking of plaintiffs' property without due process of law (R. 13).

It was alleged that one of plaintiffs had theretofore filed a suit in the State Court in an attempt to uphold the validity of a contract evolved by that plaintiff, whereby the canner would act somewhat as agent for the grower in the canning of his grapefruit, but that the Supreme Court of Florida had held such contract to violate the Act (R. 13). It was said that plaintiffs had for two weeks been operating their plants under similar contracts, but that after the decision of the State Supreme Court aforesaid, the Commissioner of Agriculture had threatened to revoke their dealers' licenses if they continued operations under such contracts (R. 13-14).

It was alleged that because of the large percentage of the canned product moving in interstate commerce, the Act would violate the Interstate Commerce clause (R. 14). The Act was challenged as unreasonable, arbitrary and vague because the "true intent and purpose" of the Act could not be ascertained therefrom, because it could not be determined who was supposed to be embraced within the class filing petitions before the Commission for the fixing of the cost

of production,[5] because the Act failed to define those "not subject to the provisions" thereof from whom agreements to abide by the Regulation should be procured, because no penalties were provided in the Act for violations thereof, and because "it is impossible to tell who or what transactions are subject to the provisions thereof" (R. 14-15). It was said that out of State handlers, who could not possibly be known by the Commission, would certainly not be subject to the Act and for that reason the Act was void (R. 15).

It was alleged that the Commissioner of Agriculture contended he had the right, under the Bond and License Act, to revoke the licenses of plaintiffs as citrus fruit dealers if they did not comply with the Act and Regulation; but it was asserted that said Commissioner was "without authority whatsoever" to take such action of revocation (R. 15-16). It was alleged that if the Commissioner should revoke the licenses, the plaintiffs would be deprived of their property without due process of law (R. 16).

It was alleged that one of plaintiffs, Florida Grapefruit Canning Company, prior to the adoption of the Regulation by the Commission, had outstanding contracts with grapefruit growers in Florida for the furnishing of approximately 60,000 field boxes of grapefruit at a price less than 32¢ per box, and that such canner had contracts to sell the processed product at a price netting the canner more than $3,000.00 (R. 16). It was said that the Regulation had made it impossible for said canner to "accept said 60,000 boxes of grapefruit" at the previous price agreed upon and that said canner could not go through with its contract with the distributor if it had to meet the cost of production with

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[5] The Act provides that such petitions must be signed by persons, firms or corporations "owning or controlling" at least 50% of the producing acreage of citrus fruit. It was contended in the complaint that the use of the word "controlling" was so vague as to render the Act void (R. 14).

the grower (R. 16-17). This was alleged to impair the *obligation* of said canner's contracts in violation of the Federal Constitution.

Temporary restraining order against the Commissioner of Agriculture was prayed restraining said Commissioner from attempting to proceed against plaintiffs under the Bond and License Law and from otherwise attempting to enforce the Growers' Cost Guarantee Act and the Regulation of the Commission (R. 17). Interlocutory injunction by a three-judge court and subsequent permanent injunction were also prayed (R. 17).

(*b*) *Amendment to the complaint.*—After the evidence had been adduced and arguments made by counsel at the three-judge hearing on April 10, 1939, plaintiffs, at the suggestion of the court, filed amendment to the complaint instanter (R. 35, 69). The amendment set forth that "by reason of the facts and circumstances herein alleged" the Act and Regulation impaired the obligations of plaintiffs' contracts and denied their right to freedom of contract and abridged the "rights of personal liberty" of the plaintiffs and arbitrarily interfered with their private business and prohibited the "lawful occupations" of the plaintiffs and imposed unreasonable and unnecessary restrictions thereon (R. 35). It was alleged that because of such "facts" the Act and Regulation violated the Fourteenth Amendment to the Federal Constitution and Article I, Section 10, thereof.[6]

Evidence

Mr. C. E. Lindsey, head of the Lakeland Highlands Canning Company, testified (R. 50-63) that the current citrus crop was the largest ever grown in the nation; that Florida

[6] We have analyzed the complaint somewhat in detail to show how definitely shallow were the facts relied upon by plaintiffs as showing a factual situation making against the constitutionality of the law.

citrus had to compete with citrus grown in California, Arizona, Texas, and Porto Rico; that Texas was the largest competitor in volume; that the current season's crop in Texas was about 15 million boxes, and in Florida about 21½ million; that the current crop was as large as Texas had ever had; that during the current season up until the Regulation of the Commission went into effect, grapefruit was being purchased at approximately 25¢ a box for fruit intended to be processed into hearts or sections and 15¢ per box for fruit intended to be canned into juice; that in order to buy grapefruit at 32¢ per box he would have to sell the canned juice product at approximately 65¢ per case, and the canned section product at 85¢ per case; that canned grapefruit juice from Texas could be bought in extremely large quantities unsweetened at 42½ cents; that about 30% of the citrus canneries in Florida are owned by individual growers or cooperatives; that after the Regulation went into effect the cooperatives were selling canned grapefruit hearts at "75 cents a dozen", which could not have netted the owner 32¢ per box; that on January 1, 1939, his company had unfilled orders for between 100,000 and 200,000 cases which could not be filled without losing money in excess of $3,000, but that in every instance he had taken the matter of the Regulation up with his distributors and had been relieved from the terms of the contract; that since he had been operating under the protection of the temporary restraining order he had gotten back all his old customers except one or two; that canned grapefruit juice competes with canned tomato juice and canned pineapple juice, and grapefruit sections likewise competes with other canned fruits; that the volume of processing was normal in Florida up until the time the Regulation went into effect, but in the two months immediately following, processing had slowed down to the extent of a deficit of two million cases over the corresponding period two years before; that "any num-

ber" of growers were willing to sell their fruit at less than 32 cents per box; that he could purchase an unlimited amount of such fruit; that "in his opinion" he would not be able to operate his business the balance of the season without a loss under the Act and Regulation; that he did not know what the condition next year would be; that the overhead of his plant would be at least $500 a week "for sometime at least" even if shut down; that he had to "maintain" his employees the year round; that the plaintiffs employed around 5,000 or 6,000 people, with payroll of about $100,000 a week during the operating season; that over 99% of canned grapefruit in Florida goes into interstate commerce; that about 40% of the grapefruit grown per season in Florida goes into cans; that in Texas, grapefruit was being sold at from six to twelve cents a box in large quantities; that the sweetened Florida product enjoyed a higher price than the similar Texas product; that at 32 cents per box he could not compete with the Texas price; that the Florida canned product is disposed of through wholesale distributors, dealers and chain stores out of Florida, who in turn send it ultimately to the consumer; that a pack is sold under the label of either the packer or distributor; that certain brands have acquired good will on the market; that the canners will lose the distributors as customers if they are unable to supply the demand; that his plant, after first closing down when the Regulation was adopted, later reopened and operated for awhile under a form of contract whereby the canner presumed to act as agent for the grower in processing the fruit, but that he ceased such operation when the Supreme Court of Florida held invalid the contract. Mr. Lindsey admitted on cross-examination (R. 59-63) that there was an abundance of grapefruit in Florida during the current season; that he was not familiar with the cost of production of grapefruit in Texas, Arizona and California; that he did not know whether the growers

who owned canning plants maintained distinct corporate entities as owners of the grapefruit groves and as owners of the canneries; that he knew nothing about the legal setup of the cooperative associations in Florida; that he had always had to compete with other canned products in the market and would continue so to do; that canned grapefruit juice and hearts the current year were priced less than in preceding years; that in order to pay the grower 32 cents per box he would have to sell the canned product for around 65 cents, but he did not know how much the cooperative organizations were paying the grower; that he knew of no instance where the cooperatives processed fruit from any other than their own member growers; that in the operation of his plant he bought grapefruit as he needed it without making contracts in advance.

Mr. Fred Elder, head of the Florida Grapefruit Canners, Inc., testified (R. 63-67) he did business on what he called "futures", that is, made contracts for the sale of the processed product well in advance of the actual canning, the contract price being based upon what he estimated the fruit for that season would cost; that in pursuance of such operations he had prior to January 1, 1939, outstanding contracts for the sale of around 100,000 cases of canned grapefruit, and that he also had made contracts for the purchase of the raw product at from 15 cents to 20 cents "on the tree"; that but for the Regulation he could have bought what he had contracted for and made over $3,000; that after the Regulation went into effect he had tried to operate under a contract providing for the cash payment of 20 cents per box to the grower and the balance of 12 cents on the ensuing July 15th if the Act was still in operation and no litigation concerning the same was pending on that date; that his contract with S. & W. Co., on the Pacific Coast, a very large jobber, obligated him to furnish 100,000 cases of canned grapefruit and that after the Regulation became

effective the jobber voluntarily agreed to advance the contract price to prevent loss on the contract if the Act were upheld; that he had always maintained that canners could pay the growers 50 cents per box for their grapefruit and still make money, provided "it could be controlled". This was all the evidence on behalf of plaintiffs.

On behalf of defendants, Mr. John Maxcy, Chairman of the Florida Citrus Commission, made affidavit (R. 40-42) stating in detail the procedure followed by the Commission in ascertaining and determining the cost of production and in promulgating the Regulation, which showed that the Commission had followed all procedural requirements specified in the Act.

Submitted and filed were also affidavits by T. L. Hodson (R. 42-43), W. W. Hubbell (R. 43-44), R. H. Howard (R. 44-45) and Chas. F. Chastain (R. 36-37), all but one officials of the Florida Citrus Commission, each detailing the procedure followed by the Commission, step by step, in promulgating the Regulation and showing that the procedure had been regular and that the cost of production arrived at by the Commission was fair, just and reasonable.

J. F. Mays, head of the Bond and License division of the Department of Agriculture, made affidavit (R. 38-39) that his division was responsible for the enforcement of the Growers' Cost Guarantee law; that from the date the Regulation became operative, both the Act and the Regulation were enforced against the cooperative associations as well as independent canners, giving specific illustration of such enforcement; that the growers in Florida who own canning plants maintain separate legal entities in the ownership of the grove properties and in the ownership of the canning plants; that as against such grower owned plants the Act and Regulation were being enforced on the theory that each legal entity was a contracting party; that he knew of sev-

eral canning corporations in Florida that had operated during all or part of the time the Act was being enforced and had consistently paid the grower his cost of production as fixed by the Commission and still made a profit in their business; that the Commissioner of Agriculture had enforced the Act strictly, fairly, uniformly and impartially during all periods of operation, both as against independent canners, cooperative associations, grower-shippers and grower-canners.

The foregoing was all the evidence adduced at the three-judge hearing on April 10, 1939 (R. 45-69).

On April 15, 1939, two days after the opinion holding the Act unconstitutional was filed (R. 81), the plaintiffs, under leave of court previously given (R. 69), filed copy of Resolution of the Florida Citrus Commission adopted on March 21, 1939, together with two affidavits. The Resolution recited that "innumerable growers and shippers" had requested the Growers' Cost Guarantee Act be enforced strictly against all handlers of citrus fruits or be discarded; that there was complaint among the growers and shippers that the law was not being equitably enforced due to "different set-ups of the different handlers and the different schemes and devices used by canners and handlers generally to evade the law"; that certain auctions of grapefruit "indicated" that the grower was not receiving his cost of production; that it was "generally felt" that all the canners were not paying the cost of production to the grower; that this placed a hardship upon those operators abiding by the law; that the Florida Supreme Court had "clearly set forth the meaning of the law"; and that the Commission again wanted to back up the Commissioner of Agriculture in the enforcement of the Act to the full extent of its power and ability. Thereupon the Resolution made declaration of policy requesting the Commissioner of Agriculture to equitably enforce the law "100 per cent upon all handlers,

shippers and canners alike", and requested the Commissioner to state his opinion as to whether the law could be enforced equally against all such handlers.

John A. Snively, President of the Polk Packing Association, a cooperative association (R. 71-72), made affidavit that his association owned a grapefruit canning plant; that during the period the Act was in effect between January 19th and March 23rd of this year, his association canned for its grower members between 60,000 and 70,000 cases of grapefruit juice; that the association had endeavored to sell its products at a price that would repay the grower at least 32 cents per box but was unable so to do, and that the products were stored and held until the enforcement of the Act was restrained on March 23, 1939; that prior to that date other cooperative associations and grower-owned canning companies in Florida quoted a lower price for grapefruit juice than his association had quoted, and actually sold the same at the lower quotation; that at the current market price of grapefruit juice the canner could not pay the grower 32 cents per box without loss, unless the grower made up the deficit in the decreased profit in the canning operations.

Mr. Ralph Polk, Sr., President of The Polk Company, made affidavit (R. 72-74) that he did not know whether the Act was being enforced against cooperatives shipping fresh fruit, but that the auction prices indicated the grower could not receive 32 cents a box for his product; that it was impossible to determine whether any canning corporation in Florida had made any profits in their business during the current season, except that it was his "honest belief" that the current prices would not return to the growers 32 cents per box; that it was impossible to determine whether any canning corporations paying 32 cents per box to the grower for his grapefruit had made any profits until the close of

the season; that "many growers" had been satisfied with less than 32 cents per box for their product and that such "is all they expect to receive"; that he knew of cooperative canneries holding large volumes of canned grapefruit for which the grower has not been paid his cost of production and which stored products were in competition with the products of plaintiffs; that when the Regulation became operative, his association was forced to cease operation because of inability to pay the grower 32 cents per box; that prior to such time his association had been employing 1,250 persons with a weekly payroll of approximately $15,000; that his association was forced to buy canned grapefruit from other cooperatives and grower owned canning plants in order to meet their contract obligations, which canned product was so purchased at prices which would not return the grower 32 cents per box.

Rulings

The Order of the three-judge court, filed April 28, 1939 (R. 75-76), decreed that interlocutory injunction be granted and the previous restraining order of the District Judge be continued in effect "until the final hearing in this case or until the further order of the Court." It was stated the injunction was granted "for the reasons to be expressed in an opinion to be filed later".

The opinion (R. 76-81), filed May 3, 1939, but dated April 13, 1939, recited that the case had been argued and submitted on April 10th, 1939, "on the bill and testimony", that the defendants had appeared and, although not having filed answers, argued the case and requested the court to pass "on all questions presented, and especially on the constitutionality of the Act involved" (R. 76). The Act was held unconstitutional because it was arbitrary and prejudicial and violated the due process clause of the Fourteenth

Amendment and also because it was discriminatory against the canners and in favor of the cooperative corporations (R. 78-80). It was held that the Act did not protect the public nor was in the interest of the public, that it sought to help the grower at the expense of the canner, that under the Act and Regulation if the canners could not pay the cost of production the grower would lose his fruit entirely. It was further held that notwithstanding the question of constitutionality the enforcement of the Act should be enjoined because there was no proof in the record that the Florida Citrus Commission had proceeded properly in determining the cost of production and in promulgating the Regulation (R. 80).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

Appellants specify the following assigned errors intended to be urged:

1. The action of the three-judge court in finding certain facts from the evidence adduced at the interlocutory hearing, which facts were considered in pronouncing judgment upon the validity of the Act, without waiting for the issues to be made up and the essential facts and constitutional questions finally determined in due course of procedure (Assignments 10 to 17 inclusive, R. 88-89).

2. The accuracy of certain findings of fact made by the court (Assignments 10 to 17 inclusive, R. 88-89).

3. The action of the three-judge court in adjudicating the merits of the case after plaintiffs had failed to show the requisite jurisdictional amount to be involved (Assignment 9, R. 88).

4. The ruling that the Act was discriminatory as against plaintiffs under the Federal Constitution (Assignment 7, R. 88).

5. The ruling that the Act was arbitrary and unreasonable under the Federal Constitution (Assignment 6, R. 88).

6. The ruling that the Act and Regulation violated the due process clause of the Fourteenth Amendment to the Federal Constitution (Assignments 4, 5, R. 87-88).

7. The ruling that the enforcement of the Regulation should be enjoined because there was no proof in the record that the Commission, before adopting the Regulation, had complied with certain procedural requirements (Assignment 17, R. 89).

8. The granting of interlocutory injunction (Assignment 1, R. 87).

SUMMARY OF ARGUMENT

I. The Procedural Question

The three-judge court was convened only for the purpose of hearing motion for interlocutory injunction. It was permissible for the District Court to hear and consider evidence upon such motion. The court should have required evidence to be in affidavit form and not permitted oral testimony before the three-judge court. Likewise, the court should have required plaintiffs to have all their evidence ready which they desired to adduce in support of their motion. Likewise, the court should not have gratuitously suggested to plaintiffs the filing of certain amendments to their complaint. But disregarding these departures as perhaps not vital, the court should not in any event have proceeded summarily to consider such motion evidence adduced at the hearing upon the question of the constitutionality of the Act and Regulation involved. The court should not have proceeded to pass judgment on the merits of the case and strike down the State law. The defendants had not even filed pleadings to the complaint. The evidence adduced by both sides was sketchy and anything but exhaustive. Plain-

tiffs produced only two witnesses at the hearing, neither of whom knew a great deal about the subject. Even if the court was determined to decide the constitutional question, it should at least not have used the testimony so offered at the hearing as the basis, either in whole or in part, for its judgment striking down the law. But the court did not wait until *all* the evidence was in on the motion for interlocutory injunction. The opinion was written and dated prior to the time plaintiffs had produced all their evidence and without waiting for such counter-affidavits as defendants might have filed under previous leave of court granted. Thus the court not only presumed to ground its judgment on the motion evidence, but upon only a part thereof. And the court also presumed to find facts from such part of the evidence. Lastly, the facts which the court so found were not sustained by the evidence adduced at the hearing proper or subsequent thereto. Summing up, the court should have restricted the hearing to what it was called for, namely, the granting or denying of an interlocutory injunction. Decision on the constitutional question should have been reserved until after a full hearing upon issues properly made up by the pleadings.

II. Jurisdictional Amount Not Involved

Appellants contend that plaintiffs in the court below did not meet their burden of alleging or proving the jurisdictional amount requisite to invoke the aid of the Federal District Court. The abstract averment is contained in the complaint that the cause involved a controversy in excess of $3,000. The complaint also went further and attempted to allege the particular items of damage. The bald allegation of the existence of the jurisdictional amount might be legally sufficient as a predicate in the complaint, but when the complaint goes further and attempts to particularize the several bases thereof, the sufficiency of the complaint in this

respect must be tested by such particular allegations. When so tested, such items of supposed damage relied on by plaintiffs fell short of the required standard.

But regardless of the sufficiency of the complaint on this point, the proof offered at the hearing clearly showed the *absence* of the jurisdictional amount. The items of damage asserted were speculative, vague and unascertainable in amount, if in fact the same existed or would ever exist. The jurisdictional amount is determined by the amount of damage shown affirmatively to accrue from the enforcement of the Act and the Regulation challenged. The value of the right sought to be protected against the enforcement of the alleged unconstitutional Act is the measure of the damages involved. Plaintiffs failed to sustain their jurisdictional burden either in the complaint or by testimony.

III. Burden Upon Interstate Commerce

The State may legislate even though the effect of the State law over interstate commerce is indirect. The distinction between "direct" and "indirect" burden upon interstate commerce is clearly defined by this Court. The mere fact that a State law may perchance create or impose a burden upon interstate commerce is not, in and of itself, sufficient to strike down the Act. Conflict with the Federal Constitution giving Congress the exclusive right to legislate upon matters within the field of interstate commerce is not brought about until the State law imposes a *direct* burden upon interstate commerce. But the instant Act imposes no burden, either direct or indirect. The regulation of the Act attaches to the article before it ever acquires the character of an interstate commerce shipment. It attaches before the interstate journey from Florida ever begins. In fact, the Act attaches before the processing of the fruit ever begins. The production of an article intended for interstate commerce is a matter of local regulation and until delivered to

the common carrier for transportation or the actual commencement of its transfer to another State the product remains intrastate. The interstate commerce clause does not in any way take from the State its inherent and fundamental right to exercise its police power in regulating or protecting an industry within its borders. The exercise of the police power has a clear field of operation before any question of interstate commerce ever arises. Furthermore, in any event, the State may legislate if Congress has failed to do so, even in fields that would otherwise be forbidden.

IV. Discrimination Against Independent Canners

The court in its opinion found that the cooperatives merely credited their grower members with 32¢ per box for the fruit furnished, which amount the grower would not receive back at the end of the season unless the market price enabled such payment. Although the Court concluded that such business methods of the cooperatives constituted discrimination in violation of the Fourteenth Amendment, it is submitted that such facts do not show discrimination at all, but merely present a *possibility* of discrimination in the event the market price will not permit the payment of 32¢ per box at the close of the season. Such amount may or may not be paid to the grower. The Court does not even hazard a guess, much less prophesy, that such amount would not be paid. Possible discrimination is not the same as actual discrimination. But even if the grower *does not* get his 32¢ per box from the cooperative to which he belongs, and even if the Act is in nowise enforced or attempted to be enforced against the cooperative (as alleged by the plaintiffs in their complaint, but not attempted to be proved), such facts would not constitute discrimination against the independent canners in violation of the Fourteenth Amendment. All independent canners are affected alike by the Act. Cooperatives are a different class than independent canners and may be

dealt with differently. This Court has so held. A regulatory Act or an administrative order may legally be enforced against independent dealers and by specific terms thereof not be enforced against cooperatives.

V. No Denial of Property Without Due Process of Law

The citrus industry in Florida was a major industry, so judicially noticed by this Court, as far back as 1915. It was, and is now, a business affected with a public interest. But the validity of price fixing Acts is not *necessarily* tested by whether the business regulated is affected with a public interest. Such Acts are unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. The Act here only operates in years of emergency. It only seeks to guarantee the grower his cost of producing the fruit, without additional margin. Freedom of contract is limited by the power of the legislature to pass regulatory measures, including price fixing, designed to protect, and eliminate evils within a major industry. The legislative findings of fact showed a condition existing in the Florida citrus industry which made necessary in years of emergency the guaranteeing to the grower of his cost of production in order that the grower might survive and the industry saved from extinction.

VI. Performance by Florida Citrus Commission of Condition Precedent in Passing Regulation

The Act provides that before the Commission adopts the the Regulation it shall procure from producers, shippers or handlers, not subject to the Act, binding agreements to conform thereto.

The Commission sufficiently complied with the Act by determining that all handlers of fruit grown in Florida were

subject to the Act. But the construction of such provision is a matter of local law. Under the Florida decisions the provision must be construed as directory rather than mandatory. Also, again adopting the local law, such provision is meaningless and may be entirely disregarded. But in any event, plaintiffs cannot object. They do not name any handlers not subject to the Act who have not signed agreements. They make no issue with the determination of the Commission. Lastly, the burden was upon those complaining to show that the Commission did not comply with the Act. In the absence of proof to the contrary, the Court must presume compliance, especially when the Regulation upon its face recites compliance. In the absence of outside proof either way, the Court is without authority to restrain the Regulation on such point.

VII. Interlocutory Injunction Should Not Have Been Granted

The sole reason expressed by the Court for granting the interlocutory injunction was that the Act was unconstitutional. If the Court was in error on the constitutional question the sole reason for entry of the order would fall, and the order should likewise fall. Also, irrespective of the reason assigned, the order should not have been entered because plaintiffs made no proper showing for an interlocutory injunction. The order was not entered until April 28, 1939, just a little over a month before the end of the canning season. Such delay was occasioned largely by failure of the plaintiffs to file their bill within a reasonable time after the Regulation became operative. Under all the circumstances of the case, and particularly in view of the delay occasioned, the canner would have suffered far less from denial of the injunction than the grower and the industry as a whole would have suffered from the granting

thereof. These facts should have impelled a denial of the application.

ARGUMENT

I. Procedure of the Three-Judge Court in Striking Down the Act and Regulation

The progress of the case in the court below is infected with so many procedural vices and departures from established and orderly practice that it makes difficult an argument on point of procedure under one head. The three-judge court was convened solely for the purpose of hearing the motion for interlocutory injunction (R. 34-35). The language of the order calling the court together limits the hearing specifically to "the hearing and determination of the application for temporary injunction" (R. 35). It may have been proper, in fact it is usually customary, for the parties at such hearing to adduce evidence in documentary form, and for the court to consider such evidence, *in the matter of determining whether or not the interlocutory injunction should be granted;* reserving always, until the final hearing in the case, a decision upon the grave constitutional questions. But here, at the very outset of the hearing, the court permitted counsel for plaintiffs to produce witnesses on the stand before the court and proceed to interrogate them orally, the same as in an ordinary damage suit in a law Court before a jury. To say the least, such procedure is unusual, undignified and cumbersome. Instances of the bizarre workings of this form of hearing were vividly presented when the court was called upon to rule upon objections of counsel during the progress of the interrogation (R. 64). The court was required, by the exigencies of the occasion, to adopt the huddle system in arriving at its rulings.

Also the matter of permitting plaintiffs more time to file affidavits, with an additional period thereafter to defendants

to file counter-affidavits. Counsel for plaintiffs presented not only a varied attack but also a resourceful one. When the factual situation for plaintiffs bogged down, upon the oral testimony, or seemed likely so to do, plaintiffs merely fell back upon the usual custom of filing affidavits and got additional time to do it (R. 68-69).

But while the foregoing anomalies of procedure may be dismissed as merely irregular but not fatal, the court proceeded from that point on to flagrantly disregard the most fundamental and elementary rules of procedure. At the time of the hearing neither of the defendants had filed pleadings. They had not even filed motion to dismiss the complaint.[7] Defendants did appear at the three-judge hearing in resistance of the motion for interlocutory injunction. The court later in its opinion recited that the defendants had requested the court to pass on the constitutionality of the Act (R. 76). It is not the province or disposition of counsel for Appellants here to take issue with this statement of the court. It is unnecessary to do so. In whatever manner such request may have been imparted to the court, or in what phraseology the same may have been couched, the fact is obvious that, even assuming such request was made, it could only extend to a determination of the validity of the Act *on its face*. Certain it is that such a request could not have encompassed a consideration, much less determination, of the *factual situation* as developed in the very loose, irregular, incomplete and hasty three-judge hearing.

But even if such a request *had* been all inclusive, and had embraced in so many words a request that the court proceed to make final determination of the facts, the court would have been powerless to do so. The court on the merits considers matters of evidence only in determination of issues

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[7] This was undoubtedly influenced by what this Court had previously said in *Polk Company* v. *Glover*, — U. S. —, 59 S. Ct. 15, see *infra*, p. 38.

of fact duly made up by the pleadings. Matters which are collateral or incidental to the main suit, such as applications for temporary injunction, receivership, etc., may be disposed of during the progress of the main case, and in the disposition of such incidental matters evidence, usually informal in nature, may be adduced. But *such* evidence has nothing to do with the main issues of the case. The merits must be determined in an orderly manner and only after issues have been made up by formal pleadings. In fact, that is the only purpose of testimony in the main suit, to enable the court to resolve the issues of fact created by adversary pleading.

So it is that the three-judge court was warranted in considering evidence adduced at the hearing *only upon the matter of issuing or denying the interlocutory injunction.* The constitutional questions would come on at a later date *after the pleadings had been filed and after testimony had been fully adduced and after final hearing and argument of counsel.* In fact, counsel for plaintiffs at the outset of the hearing practically conceded this in the following statement to the court (R. 47-48):

> "Mr. Reeves: Then I will point out to the court our position in this matter. It is our understanding that at this hearing it is *not necessary to go into all the merits of the case, to make a final determination,* but it is our duty to show that there is a substantial question involving jurisdiction (fol. 69) matter and credit, which we ask you to enjoin, and we shall receive irreparable damage unless the relief is granted that is prayed for. We feel that in this suit there are some novel questions involved, and that the court should go ahead *and protect us until final hearing, until we can get the testimony in and the issues made up.* As I understand it, no papers have been filed by the defendants or either of them."

And the court itself, in its order filed April 28, 1939, granting the interlocutory injunction, decreed that such injunction should continue "in full force and effect until the *final hearing* in this case or until the further order of the court" (R. 75-76). But when it came to writing the opinion containing the reasons for granting of the interlocutory injunction (R. 75), the court proceeded to determine the whole merits of the case. The court considered, commented upon, and apparently determined, the facts in the case from the meager evidence, mostly ex parte, which had been previously adduced at the interlocutory hearing and then proceeded to use those facts in striking down the State law as unconstitutional (R. 76-81).

It would have been bad enough if such procedure had been adopted to uphold an Act and dismiss a complaint challenging it (see *infra* p. 39). But here the streamline procedure was used to strike down the State law. It is difficult to understand just what issues would have been before the court subsequent to the filing of the opinion. The merits of the case had already been decided. The facts had already been determined. The State law had already been adjudicated unconstitutional. The well of emptiness would have been a seething cauldron compared to the justiciable matter remaining in the case after the opinion was filed. The order granting interlocutory injunction indicated the holding of a subsequent "final hearing in this case" (R. 76). But in view of the opinion, which was then already written (R. 81), there would be no rational or intelligent reason why such a future "final hearing" should be held nor what could be accomplished thereat. In point of effect the hearing on April 10th was a "final hearing", and the order of April 28th was a "final decree". The term "loose practice" is a sobriquet of meticulous procedure compared to the way this case was disposed of.

Another most unusual circumstance of procedure is that the court did not even wait *until all the evidence upon the interlocutory application was in* before writing its opinion denouncing the Act as unconstitutional. The opinion on its face (R. 81) shows that same was signed and dated on April 13, 1939, which was only three days after the three-judge hearing on April 10th. But the court, at request of plaintiffs, had on April 10th at the conclusion of the hearing, allowed five days within which plaintiffs could file additional affidavits (R. 68-69) and had granted defendants five days thereafter to file answering affidavits if desired. This would seem to automatically have operated to defer decision upon the motion for interlocutory injunction for at least ten days after April 10th, or until April 20th at the earliest. But on April 13th the Court spoke with swiftness, boldness and thoroughness. Not only was the application for interlocutory injunction disposed of but the whole case was decided. Plaintiffs in fact availed themselves of the opportunity to file additional affidavits and on April 15th filed in the case three pieces of additional documentary matter (R. 69-74). But as it subsequently developed, when the court released its opinion and filed the same in the cause, such subsequent documentary evidence of plaintiffs was unnecessary.

Appellants submit that the court below was in error in presuming to determine, or even consider, the facts as a basis for striking down the law. Such action by the court did flagrant violence to the rule laid down in *Polk Company* v. *Glover, etc.*, — U. S. —, 59 S. Ct. 15, text 17, — L. Ed. —, decided by this Court upon appeal from the same District Court, wherein it was stated:

> "The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. See Borden's Farm Products Co. *v.* Baldwin, 293 U. S. 194, 211-213, 55

S. Ct. 187, 192, 193, 79 L. Ed. 281, and cases cited. And that determination requires a *hearing in due course upon the issues raised by the pleadings.*"

In the *Polk* case, *supra*, a law of the State of Florida affecting the canning of citrus fruit was attacked in the District Court and at the time of the interlocutory three-judge hearing, the State enforcement officers, who were made defendants in the suit, had filed answers as well as motions to dismiss the bill. Voluminous evidence in the form of affidavits and exhibits was adduced by both sides at the hearing. The District Court denied the motion for interlocutory injunction, granted the motion to dismiss the bill, and made separate findings of fact and conclusions of law. The Supreme Court upon appeal, after observing that "the findings of the court indicate that *that evidence, in part at least,* underlay the final decree it entered", and that "for the purpose of that motion (to dismiss), the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction", held that plaintiffs were entitled "to an opportunity to prove their case, if they could, and *that the court should not have undertaken to dispose of the constitutional issues* • • • *in advance of that opportunity*". — U. S. text —, 59 S. Ct. text 17.

The rule announced in the *Polk* case is of equal force where the facts presented at the interlocutory hearing are used as the basis for holding a State statute *unconstitutional* as where the facts are used as the basis for holding the State law *constitutional.*

In *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, this Court discussed the necessity for important issues of fact to be tried out and determined in an orderly manner upon proper issues joined and after the fullest opportunity

to adduce testimony. The *Borden* case involved the validity of a State law of New York regulating the distribution and sale of milk. In the course of the opinion in that case (293 U. S. text 210), this Court stated:

> "* * * where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is *increasingly important* that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without *adequate factual support.*"

In remanding the *Borden's* case back to the District Court this Court directed the procedure to be thereafter pursued as follows:

> "* * * the motion for preliminary injunction should be heard and decided, and *the cause should proceed to final hearing upon pleadings and proofs;* the facts should be found and conclusions of law stated as required by Equity Rule 70½."

Mr. Justice Stone and Mr. Justice Cardozo filed supplementary memorandum in the *Borden* case, predicating their concurrence on the proposition that "there is a reasonable likelihood that the production of evidence will make the answer to the (constitutional) questions clearer" (55 S. Ct. text 193).

It is true that the opinion of the three-judge court in the instant case does not show clearly that the Court meant to make any specific findings of fact. What the Court

stated in its opinion was only that "the testimony showed" certain things to exist (R. 79-80). But whether or not these facts which the opinion states were "shown" by the testimony may be regarded as findings of fact under Rule 52, Rules of Civil Procedure (old Equity Rule 70½) or not, the conclusion is irrefutable that *such facts persuaded the Court in its adjudication on the State law.* The language of this Court in the *Polk* case that "the findings of the Court indicate that that evidence, in part at least, underlay the final decree it entered" is directly applicable.

And furthermore, it is submitted that the three-judge court was not warranted, from the evidence adduced at the interlocutory hearing, in finding or assuming the *particular facts* which it acted upon in striking down the statute. The facts which the Court mentioned in its opinion as having been "shown" by the testimony may be summarized as follows (R. 79-80): that the citrus industry as a whole is as dependent on the canners as it is on the growers; that fresh grapefruit cannot be stored for future sale, but the canned product can be; that in cases of a bumper crop the price of the fruit will be reduced and the consequent loss much greater than if such excess fruit is canned and the processed product stored for future sale; that the current year's crop in Florida was large; that the canner could not pay the cost price and process the product without suffering a loss; that the canners had large investments in their plants and employed thousands of people; that they had previous contracts for sale of canned grapefruit for future delivery which they were forced to cancel when the regulation became effective, the effect of which was to penalize the canners for the benefit of the growers; that the cooperative corporations did not pay cash for the fruit of their growers members, but credited the grower with the amount thereof and were not expected to pay the grower

such amount unless the market prices enabled the cooperatives to do so; that the Commissioner of Agriculture did not enforce the Act against the cooperatives but did enforce it against the independent canners, and that he must have construed the Act in accordance therewith; that if it cost a grower $10,000 to produce a crop and he could get $8,000 for it he would still not be able under the Act to sell his fruit and would thereby lose his entire crop; and that there was no "proof in the record" that the Florida Citrus Commission had obtained from producers and handlers, not subject to the act, agreements to conform to the Regulation, prior to the time it was promulgated (R. 79-80).

Let us see if the evidence submitted to the three-judge court, meager as it was, supported or authorized the foregoing assumptions of fact which the Court clearly used as the basis for its decision. The Court found that the industry depended as much upon the canners as upon the grower. This is a far-fetched assumption. The citrus canning industry is a comparatively young industry in Florida. It is true it has grown rapidly, but such growth has been over a comparatively short time. Plaintiffs in their complaint did not go further back than seven years prior to the filing of the complaint in showing the growth of the business (R. 3). The statistics alleged (although there was no testimony on the point) showed that the canning of grapefruit hearts had increased about 400% over the seven years; that the canning of grapefruit juice had increased about 1500% during the same time and that combination juices had only been canned during the three preceding seasons, which seasons showed an increase of over 700% from the first to the third season (R. 3). Also plaintiffs' own statistics in the complaint (although no testimony was adduced on the point) showed that during the seasons of 1933-34 the canners utilized only about one-fifth of the grapefruit crop and in the current season about 40% of

the crop (R. 4). No figures were shown prior to the 1933-34 seasons as to percentage. So that even looking at the matter from the standpoint of plaintiffs' allegations, and in the absence of evidence, the canners are far from being, even at this time, as important an outlet in the grapefruit field as the fresh fruit packer or as important to the grower as the fresh fruit packer. Canners in Florida are almost an infant industry compared with the fresh fruit packers and shippers. This Court had occasion in 1915, almost 25 years ago, to pass upon a Florida Statute prohibiting the shipment out of Florida of immature citrus fruit. Even at that early date this Court recognized and declared the citrus industry in Florida to be "a great home industry" and said further "we may take judicial notice of the fact that the raising of citrus fruit is one of the greatest industries of the State of Florida" (237 U. S. text 61). So that on the basis of abstract statistics the assumption of the Court that the canner and the grower were of *equal importance* in the citrus industry is not sustained.

But in analyzing the matter deeper than a consideration of mere figures or the age of the respective fields of the industry, there is even less basis for the assumption made by the Court. A grower is an *indispensable* part of the industry, the canner is not. The canner is merely one of the *several outlets* for what the grower produces. The grower was a part of the industry and was prospering long before any citrus product was ever packed into cans. *Without the grower, the industry could not survive.* There must be a raw product before there can be any processed product. The Act is for the benefit of, rather than the detriment to, the grower. By benefitting the grower and enabling him to survive, the entire industry is benefitted because it is saved from perishing. It is obvious that the producer could not continue if he did not receive for his product at least what it cost him to produce it. There is no more altruism

in the grower's business than in the canner's business. And even if the grower were possessed of an altruistic sentiment the plain economics of the business would soon force him out. The Act merely seeks to return to the grower, in years of emergency, a return for his product enabling him to break even. It does not allow for any margin of profit or any other charges except the actual cost of production.

So that when the Court assumes the fact that the canner is as important as the grower in the citrus industry, the Court is proceeding immediately upon a false premise which could not but fail to produce an erroneous conclusion upon the law. There was no testimony to support such fact. No such testimony *could* have been produced because it is not a fact. The allegations of plaintiffs' own complaint negatives such fact. And lastly, it is well within the realm of judicial knowledge that the industry is *far more dependent upon the grower than upon any other part of the industry, including the canner.* The legislature's own findings, stated in the preamble to the Act, which not even the complaint, much less the testimony, challenges, show that the assurance of a dependable supply by the grower is the purpose of the Act, which supply cannot be assured unless the grower can be guaranteed his cost of production in years of emergency (R. 18). The legislature found also that unwise trade practices had been and were being carried on in the sale of citrus fruit which in many cases caused the grower to receive less than what it cost him to produce his product, which fact was threatening the industry with a break-down (R. 18). These and other facts were found by the legislature and are not denied or contradicted by the canner-plaintiffs. Further argument is superfluous to demonstrate that the very first premise assumed by the three-Judge Court, that the industry is as much dependent upon

the canner as upon the grower, is so fallacious in fact and lacking in support by the record.

We will comment briefly upon other facts found or assumed by the Court. It is true that fresh grapefruit can not be stored for future sale and that the canned product can be stored (R. 79). It is also probably true that the market price of the product will be less in years of excess production than in other years (R. 79). But it does not necessarily follow, as found by the Court, that in such lean years the loss to the grower will be less if he can have his product canned and stored instead of shipped as fresh fruit. The canners would simply buy the product at the low prices and store it until such future time as prices of the processed product would be higher, thus and thereby reaping for himself a benefit from the lean season prices.

The fact, as found by the Court, that the canner could not pay the grower his cost of production without suffering a loss (R. 79) is disputable.[8] There were loose statements by plaintiffs' witnesses, largely in the nature of conclusions, which indicate that the canner *might* lose money. For instance, Mr. Lindsey testified (R. 52) that *if* he "met the Texas competition" he would either take a loss or could not operate. He stated what the processed product from Florida would have to bring to pay the grower his cost of production under the Act, but he did not say his processed product *would be unable to command that price* if the Act were in operation (R. 50-63). He was without knowledge of the respective cost of producing the fruit in Florida and in the other producing areas (R. 59). Mr. Elder (R. 66) stated that on January 1st of the current year he had outstanding contracts to deliver approximately 100,000 cases

[8] We are here dealing only with the *accuracy* of the Court's findings. The question of whether the conclusion of the Court on the validity of the law can be sustained, even assuming the facts as stated by the Court to exist, will be treated at other points in the brief.

of canned grapefruit, at prices which would not permit paying the grower 32 cents per box, but that after the Regulation went into effect his distributor had *voluntarily agreed to increase the contract price of the product in order to enable the payment to the grower of his 32 cents per box.* He admitted that under this modified arrangement he would not lose any money (R. 67). The subsequent affidavit of John A. Snively (R. 71-72) (filed after the opinion was written) merely stated that, *at the then market price of the processed product,* the canner could not pay the grower 32 cents per box (R. 71), and that if forced to do so *his association* would "have to take the loss *in operation*" (R. 72). Mr. Ralph Polk, Sr., stated (R. 73) that for a short period after the Regulation went into effect his company suspended operations because they were unable to pay the grower 32 cents per box "under the existing market conditions" (R. 73). But Mr. Polk's own assertion is neutralized by his further statement that *no canning plant could know whether it could pay the grower 32 cents per box for his product and make a profit or sustain a loss until the end of the season* (R. 73). In the face of the foregoing testimony, there is the evidence of Mr. J. F. Mays, filed at the three-Judge hearing, who testified, as head of the Bond and License division of the Department of Agriculture, that several canning corporations in Florida had operated during the time the Regulation was in effect and complied therewith and made a profit in their businesses (R. 38-39). So it is submitted that the Court was not warranted in assuming as a fact that the canners could not comply with the Act without sustaining a loss. In striking down the Act the Court should have been careful about the facts it assumed and should have acted only upon a clear and convincing showing by the testimony.

The large investments of the canners and the number of persons employed by them, as found by the Court (R. 80), is undoubtedly true. The existing contracts of the canners

for future delivery is true, but the finding of the Court that the canners were forced to cancel these contracts when the Regulation became effective (R. 80), is not borne out by the testimony. The most direct evidence on this point is by Mr. Elder, who testified his distributor had *voluntarily stepped up the contract price to enable the canner to pay the cost of production* (R. 66), which evidence certainly does not sustain the finding of the Court.

The Court was wholly unauthorized to conclude that the effect of the Regulation was to penalize the canners for the benefit of the growers (R. 80). The only benefit the grower received was to get back what it cost him to produce his fruit and the only effect it had upon the canner was to cause him to increase the price of his processed product, or cut down on his margin of profit, or decrease his operating cost.

The finding by the court that the cooperatives did not pay their growers in cash but merely gave them credits, which might or might not be paid at the end of the season (R. 80), was wholly unsupported by the testimony. Neither Mr. Lindsey nor Mr. Elder, who were the only witnesses for plaintiffs at the hearing testified as to the method of operation by the cooperatives. Neither of them were connected with the cooperatives. Mr. Lindsey did not even know under what law the cooperatives operated (R. 59-60). Mr. Lindsey did not know how much the cooperatives were paying the grower (R. 62). Mr. Elder was not even interrogated about the cooperatives (R. 63-67). Mr. John A. Snively filed affidavit two days after the opinion was written (R. 71), stating that his cooperative association, of which he was president, merely took the processed product which they were unable to dispose of at a profit, and *held the same in storage* while the Regulation was in effect (R. 71). Nowhere did he depose that the cooperatives *merely made book entries* in payment to the grower, such as found by the court. On the other hand, Mr. J. F. Mays positively

stated (R. 38) that the law was being strictly enforced as to all cooperatives. So the finding of the court on this point is not warranted. Likewise the finding of the court that the Commissioner of Agriculture did not construe the law as applicable to the cooperatives (R. 80) was not warranted upon the same evidentiary considerations just stated.

The court posed a purely hypothetical case of a grower producing a crop of fruit costing $10,000 and not being able to get anything for it under the enforcement of the Act and Regulation, although he could have gotten $8,000.00 for his crop if the Regulation were not in effect. It is needless to comment upon these facts because there was no evidence whatever in support thereof. The court merely assumed an abstract set of circumstances to sustain its theory of the *unwisdom* of the law. No growers were before the court complaining. Not even any packers or shippers were before the court. Only one isolated part of the industry, the canners, and only a few of those, were before the court. And the hypothetical case posed by the court hardly follows from the facts actually adduced. The evidence does not prove that if it cost the grower $10,000 to produce his crop he could not get that much for it. He might, for all the evidence proves, be able to sell it to the canners. As a matter of fact, even if all the canners were forced out of business, there is no showing in the record that the grower could not find outlets for all his fruit in the fresh fruit market. Also, if some of the canners had to slack down on their break-neck rate of processing, it might cause a decrease in the supply of the processed product and thereby raise the prices. The hypothetical set of facts assumed by the court was wholly unjustified, but perhaps betrays the real reason behind the court's decision to be *a dislike for the law.*

The last fact found by the court in its opinion is likewise without support in the evidence. The court found "no proof in the record" that the Florida Citrus Commission had obtained from those members of the industry not subject to the Act binding agreements to conform to the Regulation (R. 80). All the evidence before the court was directly to the contrary. The affidavit of Chas. F. Chastain (R. 36), the affidavit of John Maxcy (R. 40), the affidavit of T. L. Hodson (R. 42), the affidavit of W. W. Hubbell (R. 43), and the affidavit of R. H. Howard (R. 44), all but the latter of whom were officials of the Florida Citrus Commission, show a careful and painstaking adherence to all duties and conditions precedent imposed by the Act upon the Commission. The Regulation itself, as adopted unanimously by the Commission, shows on its face (R. 31) that the Commission took full cognizance of the provision of the Act referred to.

We have dwelt somewhat tediously upon the facts used by the court in its opinion as a basis for denouncing the Act and Regulation, for the reason that the facts stated in the court's opinion are very important. *These facts were used to knock out the State law.* The opinion shows it on its face. The court stated that the "effect" of certain facts was to deprive plaintiffs of their property without due process of law (R. 80). The court also stated that certain facts "certainly was discrimination against the canners" (R. 80). Other facts were stated to be "alone sufficient to make the Act arbitrary and prejudicial" (R. 80). That the facts stated by the court were relied upon to justify its opinion on the constitutional question is too obvious for further discussion.

It is respectfully submitted that the court was (1) not warranted in deciding the constitutionality of the law upon the motion for interlocutory injunction; (2) that it should

not have considered the facts introduced at such hearing as a basis for deciding the constitutional questions; (3) that if it did assume to consider such facts it should have waited at least until *all* the facts were in before making any findings upon which to base its decision; and (4) that the facts as so found by the court were not warranted or supported by the testimony.

II. The District Court Decided the Merits of the Case Without Jurisdictional Amount Being Shown

Plaintiffs alleged generally in their complaint that the cause involved a controversy in excess of $3,000, exclusive of interest and costs (R. 3). Other more specific allegations were alleged. Thus plaintiffs alleged that, except for the Act and Regulation involved, they could and would have bought grapefruit and processed the same at a profit of more than $3,000 to each plaintiff (R. 5). It was said that plaintiffs were threatened with loss of their property without due process of law to the damage to each of over $3,000 (R. 5). It was said the Florida canners could not compete with the Texas canners with the Act in force and that thereby each plaintiff would suffer a loss in excess of $3,000 (R. 7). It was said that if plaintiffs had to close down their plants they would be forced to maintain their overhead during the period of inactivity, in which event each of plaintiffs would suffer loss in excess of $3,000 (R. 9). It was said if plaintiffs could not market their processed product they would be damaged in loss of good will and trade mark in excess of $3,000 each (R. 9-10). It was said that plaintiffs would not be able to compete with the cooperatives and that this would cause a loss of over $3,000 to each plaintiff (R. 11). It was said that one of plaintiffs, Florida Grapefruit Canning Company, had outstanding

contracts with its distributors for delivery of a large quantity of the processed product at a contract price which would have given the canners a profit of over $3,000, but which profit could not be realized if the Act and Regulation were in effect (R. 16).

The foregoing are all the allegations, general and special, in the complaint, with reference to jurisdictional amount involved. Most of the allegations are in general terms and add nothing to the general allegations contained in Paragraph III of the complaint (R. 3). But the evidence offered at the three-judge hearing wholly failed to prove or support the meager allegations of the bill in this respect. Mr. Lindsey, manager of one of the plaintiff corporations, testified that he had orders for "somewhere between 100,000 and 200,000 cases" of canned grapefruit at a contract price which would have caused this company to suffer a loss in excess of $3,000 if required to pay the grower 32¢ a box for the raw product (R. 63). But Mr. Lindsey was then asked "What happened—did you get out of those orders?" (R. 53) and he replied that the distributors had, upon request of his company, relieved the company of its obligation under the contract (R. 53). He stated that since the temporary restraining order had been in force his company had gained back as customers all but one or two of the distributors. These facts failed to prove jurisdictional amount. Mr. Lindsey's company did not lose anything. He did not say, nor was he asked, what profit, if any, his company *would have made* if allowed to go through with the contract without the operation of the law. For all his evidence showed his company would have made *no profit at all.* In the one event, the company would have been merely swapping dollars, and in the other event the deal was simply off. Further attempt was made, during the testimony of Mr. Lindsey, to show jurisdictional amount. He testi-

fied (R. 55) that it would cost his plant at least $500 a week "for some time at least" as overhead charges even if not operating. But Mr. Lindsey did not testify in this connection that his plant would have to close down. He merely said that in his "opinion" he could not operate and pay the grower 32¢ per box "without losing money" (R. 55). Whether his opinion was accurate or not, whether it was based upon any more facts than he stated, or how much money would be lost, are facts which, from the evidence, are within the realm of speculation. In fact, he only "imagined" that the loss, if forced to close down, would be $500 a week in overhead (R. 55). This testimony does not measure up to the required standard of proof of jurisdictional amount. Mr. Fred Elder, the other witness for plaintiffs, testified that except for the operation of the Act his company could have made over $3,000 on outstanding contracts for delivery of the canned product (R. 64). But Mr. Elder admitted that on this contract, providing for the delivery to a Pacific Coast distributor of 100,000 cases, the distributor voluntarily advanced the contract price in order to enable the company to pay the grower 32¢ per box after the Regulation went into effect (R. 66). Mr. Elder also admitted that his company had submitted to the Commissioner of Agriculture a proposed contract with the grower whereby his company would pay the grower 20¢ per box cash and the balance of 12¢ per box on the ensuing July 15th providing the Act was upheld and no litigation then pending (R. 65). This in itself shows a willingness to do business under the Act. Mr. Elder admitted that although he made his contract with the distributors in advance of the season, he utilized the fruit from the growers from day to day (R. 64) which fact automatically caused a fluctuation in his margin of profit or loss, whether the Act was in operation or not, depending upon the current market price.

The foregoing is all the evidence adduced by plaintiffs in support of the allegation of jurisdictional amount. Neither of the subsequent affidavits produced by plaintiffs on April 15th (R. 71-75) mention the jurisdictional amount. It is submitted that such proof is insufficient to confer jurisdiction upon the District Court.

In the case of *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 80 L. Ed. 1135, suit was brought by General Motors Acceptance Corporation of Indiana to enjoin the enforcement officials of that State from enforcing a certain Indiana Act of 1935. The Act prescribed regulation of the business of purchasing contracts arising out of retail installment sales. The validity of the Act was challenged because of asserted conflict with the due process and equal protection clauses of the Federal Constitution. Interlocutory injunction was sought and upon hearing before a three-judge District Court final decree was entered granting permanent injunction. No opinion was rendered. The District Court made no specific findings of fact upon the amount in controversy other than the *implied* finding of existence thereof by the granting of the injunction.[9] Apparently, from the opinion of this Court, the point was not at first raised nor argued upon the appeal. However, upon the argument in this Court leave was given the General Motors Corporation to file brief upon the point of jurisdictional amount. The case was later disposed of by this Court solely upon that point. The opinion recited the averments of the bill filed in the lower court with respect to the alleged items of damage. Such items as alleged followed in principle the same items alleged in the bill of complaint filed in the instant case. These concerned the value and worth of plaintiff's business, the value of their equipment, the value of their contracts, loss of profits from enforce-

[9] The same situation exists here.

ment of the Act, etc. (Id. 298 U. S. text 180). The opinion then states (Id. 298 U. S. text 181):

> "Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 27 S. Ct. 529, 51 L. Ed. 821; Bitterman *v.* Louisville & Nashville R. Co., 207 U. S. 205, 28 S. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; Berryman *v.* Board of Trustees of Whitman College, 222 U. S. 334, 32 S. Ct. 147, 56 L. Ed. 225; Glenwood Light Co. *v.* Mutual Light Co., 239 U. S. 121, 36 S. Ct. 30, 60 L. Ed. 174; Healy *v.* Ratta, 292 U. S. 263, 54 S. Ct. 700, 78 L. Ed. 1248. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

This Court observed in the *General Motors* case that the general averment was made in the bill that the matter in controversy exceeded the sum of $3,000, exclusive of interest and costs, and that such allegation was denied by the an-

swer. The General Motors Company argued that the burden of proof lay upon the defendant enforcement officers in such case and not upon those challenging the act assailed. This Court determined that question adversely to the General Motors Company and held as follows (Id. 298 U. S. text 188):

"We think that the terms and implications of the Federal act leave no sufficient ground for varying rules as to the burden of proof. The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District

Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty."

This Court held in the *General Motors* case that the issue was one of fact and that it was the *duty* of the District Court, at any stage of the proceedings, to inquire into the existence of such facts and to see that such proof was presented, *even where no formal issue was made up.*

The case of *McNutt, Governor* v. *McHenry Chevrolet Co., Inc.*, 298 U. S. 190, 80 L. Ed. 1141, was argued before this Court and decided on the same date as the *General Motors* case. The *McHenry* suit was brought before a three-judge Federal Court, challenging the same Act involved in the *General Motors* case. In the *McHenry* case the plaintiff was a dealer selling automobiles at retail for cash or on the installment plan. The District Court granted permanent injunction and the appeal therefrom was decided by this Court upon the same proposition stated in disposing of the *General Motors* case. Different allegations of damage were relied upon in the *McHenry* case, which allegations were reviewed by this Court in the opinion (Id. 298 U. S. text 191-192). The *McHenry Company* averred the net worth of its business to be in excess of $3,000; that it had on hand automobiles of the combined value of $16,000; that its retail prices from the sale of cars during five months expiring May 31, 1935 amounted to about $164,000; that most of its sales consisted of installment transactions; that based upon orders and other data, it expected to sell a large number of cars in June and July of 1935 and during the remainder of that year, and that the conduct of its business would be rendered uncertain "by reason of the risk involved in making future commitments for the purchase of automobiles and the inability to obtain future commitments for the resale of such automobiles and for those on hand, and for the sale of

retail installment contracts covering the automobiles on hand, as well as cars which might be ordered, to the General Motors Acceptance Corporation or any other finance company" (Id. 298 U. S. text 191-192). This Court observed that while the District Court made findings with respect to the character and extent of McHenry's business, "the record contains no finding or evidence showing the amount of the loss, if any, which would be caused by the regulations assailed" (Id. 298 U. S. text 192). The case was reversed upon authority of the *General Motors* case.

In the case of *KVOS, Inc.*, v. *Associated Press*, 299 U. S. 269, 81 L. Ed. 183, the point was again considered. KVOS was a radio station at Bellingham, Wash., and suit was brought by the Associated Press to enjoin the radio station proprietor from appropriating, using or disseminating news gathered by the radio station during the period that such news had commercial value to the Associated Press and its members; in other words, to keep such news for the exclusive use of the newspaper so long as such news had any value as such. Temporary restraining order was issued by the District Court and an order was entered directing the radio station to show cause why an injunction should not be granted. Prior to the hearing upon injunction, the radio station filed motion to dismiss, raising among other things the absence of jurisdictional amount. Adversary affidavits were presented at the hearing, upon motion for preliminary injunction and upon motion to dismiss. The District Court found that the business and conduct of the parties was substantially as alleged in the bill, and that "the amount in controversy herein, by reason of defendant's motion, must be construed to be in excess of $3,000, exclusive of interest and costs", but found that the radio station had not interfered with the normal operation of the Associated Press's business or diverted any of its profits. The District Court held that it had jurisdiction of

the parties and the subject matter because the motion to dismiss "admitted" the existence of jurisdictional amount, but dismissed the suit and refused preliminary injunction because it found that the acts of the radio station did not amount to unfair competition nor violate property rights. The Court of Appeals held the jurisdictional amount to be amply shown, and that the radio station was in competition with the Associated Press and its constituent newspaper members and directed issuance of preliminary injunction. Upon certiorari, this Court observed that "Although the decision with respect to the amount in controversy was assigned as error in this Court, the parties have in the main directed their arguments to the merits . . . . We have no occasion to consider the soundness of these conflicting contentions, for we hold that in the circumstances the respondent had the burden of showing that the case was within the District Court's jurisdiction, and failed to carry it" (Id. 299 U. S. text 277).

The importance of the holding in the *KVOS* case is seen from the fact that this Court refused to be guided by the supposed precedent of the case of *International News Service* v. *Associated Press*, 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293, in which case this Court considered the merits although the allegations of the bill involved therein were substantially the same as those of the bill in the *KVOS* case.

Again in the further case of *Kroger Grocery & Baking Co.* v. *Lutz, Attorney General*, 299 U. S. 300, 81 L. Ed. 251, this Court passed upon the question. In the *Kroger* case plaintiff brought a suit to restrain enforcement of an order of the Milk Control Board of Indiana fixing the price of milk sold in a certain area. Upon hearing before a three-Judge District Court upon motion for preliminary injunction, the suit was dismissed for want of jurisdiction upon

the ground that the requisite jurisdictional amount was not involved. The District Court found, as quoted by this Court in its opinion (Id. 299 U. S. text 300-301), that the plaintiff owned and operated a grocery store chain in and out of the State of Indiana, a number of which were located within the area fixed in the order of the Milk Control Board involved therein; that the investment in such stores approximated $450,000, having annual sales approximating two million dollars, of which amount the sum of approximately $45,000 was received from sales of milk and dairy products. It was further found that said stores sold less than 550,000 quarts of milk per year, the profit upon which was .00398 per quart. It was computed that the total loss of plaintiff in profits for a one-year period if it completely lost its milk business would be $2089.00 on the basis of 550,000 quarts. This Court held as follows (Id. 299 U. S. text 301-302):

> "In determing whether the requisite jurisdictional amount is in controversy, where it does not appear that the complainant is deprived of its license or is prevented by the regulation from prosecuting its business, the question is not the value or net worth of the business, but the value of the right to be free from the regulation, and this may be measured by the loss, if any, that would follow the enforcement of the rule prescribed. McNutt *v.* General Motors Acceptance Corporation, 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135.
>
> In order to support its contention, complainant seeks to capitalize its earnings and thus to arrive at the value of the part of the business affected by the order. But that basis of ascertaining a capital loss is not available to complainant here, as the statute, and with it the order, expire by limitation on July 1, 1937. The hurt by reason of the regulation does not appear to be greater than the loss sustained while the statute is in operation. The decree of the District Court is affirmed."

In the case of *Healy* v. *Ratta*, 292 U. S. 263, 54 S. Ct. 700, this Court had under consideration an Act of the State of New Hampshire which required the payment of an annual license tax for a peddler or hawker. The Act was challenged as an infringement of the Fourteenth Amendment. Suit was brought in the New Hampshire Federal District Court. The sale and distribution of vacuum cleaners in the State of New Hampshire by Ratta, a traveling salesman, without payment of the peddler's tax, gave rise to the suit. It was alleged by Ratta that the value of his business and his loss on account of the infringement of the Act, would each be more than $3,000. The District Court concluded that the requisite jurisdictional amount had been shown. After the decree of the District Court for plaintiff had been affirmed by the First Circuit Court of Appeals, this Court reversed on the ground that jurisdictional amount was not present. We quote from a portion of the opinion which may be pertinent and applicable to the instant case (292 U. S. text 268, 54 S. Ct. text 702):

> "It has been said that it is the value of the 'object of the suit' which determines the jurisdictional amount in the federal courts, (cases cited). But this does not mean objects which are merely collateral or incidental to the determination of the issue raised by the pleadings. The statute itself does not speak of objects of the suit. It confers jurisdiction only if 'the matter in controversy exceeds * * * the sum or value of $3,000. * * *
>
> Where a challenged statute commands the suppression or restriction of a business without reference to the payment of any tax, the right to do the business or the injury to it is the matter in controversy. (Cases cited.) But the possible suppression of the business here, through the prosecution of those who conduct it, is but the threatened consequence or penalty for nonpayment of the challenged act. It is true that, where there is no method at law to test the legality of a tax

without risk of incurring a penalty, the imminence of the penalty may involve such a threat of irreparable injury as to satisfy the requirements of equity jurisdiction. (Cases cited.) But the inability of a taxpayer to litigate the validity of a tax without risk of irreparable injury to his business, which is ground for invoking the equity powers of a federal court, affords no measure of the value of the matter in controversy.

* * *

Not only does the language of the statute point to this conclusion, but the policy clearly indicated by the successive acts of Congress regulating the jurisdiction of federal courts supports it. Compare Davis *v.* Mills (C. C.) 99 F. 39, 40. From the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this court. Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. *The policy of the statute calls for its strict construction.* The power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution (article 3) (cases cited). Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they *scrupulously confine their own jurisdiction to the precise limits which the statute has defined.* (Cases cited.) (Italics ours.)

In the case of *Henneford et al.* v. *Northern Pac. Ry. Co.*, 303 U. S. 17, 58 S. Ct. 415, this Court considered an Act of the State of Washington, which levied a 2% tax for the

privilege of using within the State certain tangible personal property. Suit was brought by the railroad company in the Federal District Court to restrain the enforcement of the State law. A three-Judge District Court enjoined the enforcement of the tax. Upon appeal this Court reversed because of the failure of the record to show requisite jurisdictional amount. The amount of the tax sought to be enjoined was $2,044.08, but the Railroad Company had alleged that upon failure to pay the tax the enforcement authorities would cease and sell the company's property to the irreparable damage to the company of more than $100,000. This Court held that, although, lacking an adequate remedy at law in the Federal Court, the Federal Equity Court was available, the jurisdictional amount of $3,000 was not present. It was held that damages which *might* accrue upon the failure to pay the required tax could not be computed as damages under the Federal Statute.

Although the facts were not exactly parallel, an application of the *rationale* of the above cases demonstrates that the case at bar was not maintainable in the District Court. As stated in the *Kroger* opinion, "The question is not the value or net worth of the business, but the value of the right to be free from the regulation, and this may be measured by the loss, if any, that would follow the enforcement of the rule prescribed" (*Id.* 299 U. S. text 301). And as stated in the *radio station* case, where the bill goes further than the formal allegation of jurisdictional amount and presumes to set forth *particular* averments of damage "in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint," the suit should be dismissed by the Court *sua sponte* or upon motion of defendant (*Id.* 299 U. S. 277).

It is true that, in view of the foregoing authorities, the complaint alleging in general terms the existence of the

requisite jurisdictional amount might have been sustained as a pleading. But when the court went beyond the granting of an interlocutory injunction and proceeded to, in effect, determine the full merits of the case by holding the State law unconstitutional, the existence of jurisdictional amount should have been previously established as a condition, prerequisite. It is unnecessary to consider whether the court could have, in the absence of pleadings by defendants raising the point, have proceeded to issue an interlocutory injunction without passing on the merits of the case. Here the court proceeded at once to a consideration of the constitutional questions and struck down the State law. The court was without jurisdiction to do this unless plaintiffs first established jurisdictional amount.

The testimony on behalf of plaintiffs did not show measurable damage in excess of $3,000. Such damage as was sought to be proved was merely speculative and consisted of opinions and apprehensions.

It is submitted that upon the point of jurisdictional amount the judgment or order appealed from should be reversed with directions to dismiss the case.

III. The Act and Regulation do not Impose a Burden upon Interstate Commerce

It was alleged in the Complaint that over 99% of the processed products of plaintiffs went into interstate commerce (R. 5). It was alleged that the enforcement of the Act might "diminish the flow" of the packed product into interstate commerce from Florida (R. 7). At the hearing evidence was adduced by plaintiffs to sustain the heavy volume of interstate commerce in the packed product (R. 56). Upon the basis of the foregoing facts the contention was made that the Act violated the interstate commerce clause of the Federal Constitution (R. 14).

Appellants contend that the enforcement of the Act does not impede or obstruct interstate commerce or impose any direct burden thereon. The Act and Regulation operates before the processed product ever begins its journey out of the State and *even before the product is ever canned.* The Act operates when the canner buys the raw grapefruit from the grower. *When the product begins its interstate journey it is not even in the same condition as it is when the challenged act attaches.* The police power of the State is therefore exerted *before* the product ever acquires the charactr of interstate commerce.

In *Carter* v. *Carter Coal Company,* 298 U. S. 238, 56 S. Ct. 855, the Supreme Court passed upon a Federal regulatory Act which depended for constitutional validity upon the theory that Congress could regulate where the effect upon interstate commerce was *either direct or indirect.* The Supreme Court drew a sharp distinction between the two terms, holding that Federal regulation was permitted only where the effect upon interstate commerce is *direct,* and that when such effect is merely indirect (*i. e.* incidental), the Federal government has no jurisdiction. The 18th headnote of the *Carter* case defines the distinction:

> "The word 'direct' implies that the activity or condition invoked or blamed shall *operate proximately and not mediately, remotely, or collaterally to produce the effect.* It connotes the absence of an efficient intervening agency or condition. And the *extent of the effect bears no logical relation to its character.* The distinction between a 'direct' and an 'indirect' effect turns, not on the magnitude of either the cause or the effect, but *entirely on the manner in which the effect has been brought about.*"

Referring to certain attempts of the Congress to enlarge the scope of Federal regulation, the court in the *Carter* case observed that—

"If the commerce clause could be construed to reach transactions having an *indirect* effect upon interstate commerce, the Federal authority would embrace practically *all the activities of the people*, and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government." (*Id.* 298 U. S. text 309, 56 S. Ct. text 872.)

And that

"* * * on such a theory, even the development of the state's commercial facilities would be subject to Federal control."

The *Schechter* case (text 295 U. S. 546, 55 S. Ct. 850) was a forerunner of the *Carter Coal Company* case and laid down the principle that Federal power is limited to such transactions as *directly* effect commerce between the States and that where such affect is merely *indirect*, such transactions remain within the domain of the State's power.

The principle laid down and applied in the *Carter* and *Schechter* cases is still the law. The Supreme Court has not receded from those views formerly expressed, either in the *Jones and Laughlin* case or any other case. A close reading of the *Jones and Laughlin* case, 301 U. S. 1, 57 S. Ct. 615, will demonstrate that the principle announced in the *Schechter* and *Carter* cases was preserved and redeclared and merely applied to the fact of that case. The fact that when so applied, the Wagner Act, which was involved in the *Jones and Laughlin* case, was upheld as constitutional, whereas the National Industrial Recovery Act and the Bituminous Coal Conservation Act involved in the *Schechter* and *Carter* cases were stricken down, in no way detracts from the point in issue. The difference between the *Jones and Laughlin* case and the earlier cases rests in the facts shown to exist in the different businesses and industries involved in the several cases, and not in the principle of law

which divides the scope of National and State power under the Commerce clause. That yardstick remains the same. We have but to consider certain pertinent extracts of Mister Chief Justice Hughes' opinion in the *Jones and Laughlin* case to see that this is true. We quote (301 U. S. text 30, 57 S. Ct. text 621):

> "The authority of the Federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes between commerce 'among the several States' and the internal concerns of the State. That distinction between what is national and what is local in the activities of commerce, is vital to the maintenance of a Federal system. * * * It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. * * * Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."

The principle involved is not new, but is merely the restatement of established doctrines in the construction of the constitutional provision by the Supreme Court itself.

In *Hall* v. *Geiger-Jones Company*, 242 U. S. 539, 61 L. Ed. 481, the Supreme Court considered the constitutionality of the Blue Sky Law of Ohio. It was contended that law was unconstitutional as a State law because the business and transactions there regulated were to some extent interstate commerce and that the Act challenged purported to regulate in a field of Federal power. The Supreme Court, by opinion of Mr. Justice McKenna, held the effect of the Act

was to impose merely an indirect burden upon interstate commerce, which was not sufficient to place such businesses or transactions regulated within the scope of Federal authority.

The authority of the Federal government within its sphere is exclusive. *Iroquois Transportation Co.* v. *DeLaney Forge & Iron Co.*, 205 U. S. 354, 51 L. Ed. 836. If this be true, it must conversely follow that the authority of the State within its sphere is exclusive.

The famed case of *Hammer* v. *Dagenhart*, 247 U. S. 251, commonly known as the "Child Labor case," is familiar to the Court. Whether or not the majority opinion in that case is still the prevailing view of this Court is unnecessary to a decision upon the point in the instant case. The point in the progress of the product about which this Act concerns itself is so far removed from the possible beginning of interstate commerce that either the majority or minority opinions in *Hammer* v. *Dagenhart* could be used as authority against the contention of interstate commerce here.

In several cases this Court has held that dealing in negotiable paper, even from one State to another, does not constitute interstate commerce. Thus in *Nathan* v. *Louisiana*, 8 How. 73, a broker engaged in buying and selling foreign bills of exchange through the mails was held not to be engaged in commerce, but merely supplying an instrument of commerce. In *Hemphill* v. *Orloff*, 277 U. S. 537, a business of buying and selling negotiable notes in various States was held not to constitute interstate commerce. In *Graniteville Manufacturing Co.* v. *Query*, 44 F. (2d) 64, affirmed in 283 U. S. 376, dealing in promissory notes between States was held not to constitute interstate commerce.

The interstate commerce clause of the Federal Constitution does not restrict the exercise of the State's police power. *N. Y. & N. H.* v. *N. Y.*, 165 U. S. 628, 41 L. Ed. 853, 17 S. Ct. 418. State laws for the regulation of trade was among the

earliest exertions of the police power in this country. It has been persistent, and such laws have been widely applied to commodities "commonly sold in containers." *Pacific States Box & Basket Company* v. *White*, 296 U. S. 176, 56 S. Ct. Rep. 159. Until such time as a commodity actually commences its journey from one State to another, the State in which the commodity is located has full jurisdiction to regulate its manufacture and production. *Chassaniol* v. *City of Greenwood*, 291 U. S. 584, 78 L. Ed. 1004.

Even though the subject matter of the Act is within the jurisdiction of Congress under the interstate commerce clause, yet *if Congress has not legislated specifically on the subject the State may do so.*[10] *Western Union Telegraph Company* v. *Crovo*, 220 U. S. 374, 55 L. Ed. 502, 31 S. Ct. 376; *Gulf C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 98, 39 L. Ed. 910.

In *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products*, — U. S. —, 59 S. Ct. 528, the subject matter of the Act came far closer to approaching the status of interstate commerce than does the subject matter of the instant Act. In the *Eisenberg* case this Court considered an Act of the Commonwealth of Pennsylvania regulating the sale and distribution of milk and creating a Milk Control Board in that State with broad powers which among other things included the right to fix minimum prices to be paid by milk dealers to producers for milk. The Eisenberg Company purchased milk in Elizabethville, Pennsylvania, from approximately 175 farmers in the neighborhood and, without any processing of the milk, transported

[10] It is unnecessary here to cite the many cases by this Court construing whether or not a particular State law encroaches upon a field wherein the Congress has already legislated. Compare *Armour & Company* v. *State of N. Dak.*, 240 U. S. 510; *Savage* v. *Jones*, 225 U. S. 501; *Kelly* v. *Washington*, 302 U. S. 1. Here there is no contention that Congress has invaded or preempted the field.

the same to New York City for sale. The journey was continuous from Elizabethville to New York City and all milk purchased at Elizabethville was shipped to and sold in New York. The State Supreme Court of Pennsylvania affirmed a decree of a lower State Court restraining the enforcement of the Act against Eisenberg on the theory that the Act could not apply to his company because he was doing an interstate commerce business. The Milk Control Board of Pennsylvania conceded that Eisenberg's business was interstate commerce. This Court, upon appeal from the Pennsylvania Supreme Court, posed the question for decision as whether "in the absence of Federal Regulation the enforcement of the statute is prohibited by Article I, Section 8 of the Constitution". This Court held that Eisenberg was subject to the State Act notwithstanding his business was interstate commerce. We quote from the opinion:

> "This Court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation must be prescribed by a single authority.[5] But in matters *requiring diversity of treatment according to the special requirements of local conditions*, the states remain free to act within their respective jurisdictions *until Congress sees fit to act* in the exercise of its overriding authority.[6] One of the commonest forms of state action is the exercise of the police power *directed to the control of local conditions* and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power,

the state law might thereby be restricted in operation or rendered unenforceable.' These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their application in connection with the myriad variations in the methods and incidents of commercial intercourse."

We have already alluded to the case of *Sligh* v. *Kirkwood*, 237 U. S. 52, wherein this Court upheld a Florida statute which made it unlawful for any person to sell, offer for sale, ship or deliver for shipment, any citrus fruits which were immature or otherwise unfit for consumption. The particular Act was Chapter 6236, Laws of Florida, Acts of 1911. The extent of State power to enact police regulation to protect a State industry as opposed to the contention that the Act affected interstate commerce was considered by the court in an opinion written by Mr. Justice Day. We quote in part:

"Nor does it make any difference that such regulation incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt *to protect the people of the State* * * * So it may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the State from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the leg-

islature assuming the subject to be a proper matter of state regulation."

The State Act involved in the *Sligh* v. *Kirkwood* case directly concerned the sale and shipment of citrus fruits from Florida *without processing.*

Nor can the case of *Lemke* v. *Farmers Grain Company,* 258 U. S. 50, be relied upon as controlling authority to the contrary of appellants' contention. The North Dakota Act there involved had none of the vital elements present in the Act involved here. The preservation of the industry was not imperilled. A constant and dependable supply of grain (which was the subject matter of the North Dakota Statute) was not being endangered. There was no acute economic condition in North Dakota within the grain industry which gave rise to the passage of the Act. There was no processing of the grain. All of these things *were* facts found to exist by the legislature of Florida and which directly prompted the passage of the instant Act. Other distinguishing features between the facts in the *Lemke* case and the facts involved here may be noted. Mr. Justice Day wrote the opinions in both cases and the *Sligh* v. *Kirkwood* case dealt directly with the Florida citrus industry and a Florida law designed to protect that industry.

But even assuming for present purposes that the majority opinion in the *Lemke* case, written by Mr. Justice Day, is contrary authority, appellants insist that the views expressed in the minority opinion of the *Lemke* case written by Mr. Justice Brandeis, and concurred in by Mr. Justice Holmes and Clarke, is more compatible with the prevailing views of the majority of this Court as now constituted. Of the original members of the court who sat on the *Lemke* case, only Mr. Justice McReynolds is now a member of the court. Without intending to be presumptuous, appellants submit that Mr. Justice Brandeis's dissenting opinion would

today be the majority opinion in the *Lemke* case. The dissenting opinion (258 U. S. text 61, 66 L. Ed. text 465), reviewed the reasons which prompted the legislature of North Dakota to pass the Act. Fraud was being perpetrated in the unofficial inspection of the grain and by means of unconscionable bargains through which the farmer was not compensated for valuable dockage or *was not receiving a fair value for his grain.* It was said that the North Dakota legislation sought to protect the local farmer from these frauds practiced by local buyers by establishing a system of State inspection, grading, and weighing, requiring such inspection before grain could be purchased, protecting the farmer in the matter of dockage, and "*by requiring payment to the farmer of the fair value of grain,*—the value to be ascertained by fixing the so-called margin" (273 U. S. text 62-63; 66 L. Ed. text 465-466). After thus reviewing the evils which gave rise to passage of the Act and the object sought to be so accomplished thereby, the minority opinion in its pertinent parts holds:

> "Ordinarily, when a state's police power is exerted in connection with sales, it is the buyer whom the law seeks to protect; and the seller is licensed as part of the machinery to enforce the regulations prescribed. *I cannot doubt that the state has power as broad to protect the seller, and, to that end, to license the buyer.* Compare House *v.* Mayes, 219 U. S. 270, 55 L. Ed. 213, 31 Sup. Ct. Rep. 234. Ordinarily the function of inspection, grading, and measurement is committed to a public official or other impartial person. *But I am not aware of any constitutional objection to imposing the duty upon the buyer, where conditions demand it.* • • • The requirement that the buyer shall take only a proper margin for graded grain is, in effect, *requiring that he pay a fair price. Laws designed to prevent unfair prices are ordinarily enacted to protect consumers. But there is no constitutional objection to protecting producers against unconscionable bargains, if*

conditions are such that it is they who require protection. Nor can there be any constitutional objection to using, as a factor in determining what is fair, the price prevailing in terminal markets,—even if they happen to be located in another state.

Whether the purchases involved in this case were intrastate or interstate commerce we need not decide. For the fact that a sale or purchase is part of a transaction in interstate commerce does not preclude application of state inspection laws, *unless Congress has occupied the field, or the state regulation directly burdens interstate commerce.* That neither of these exceptions applies here appears from the description of the operation of the Federal and the state laws given below, in the opinion of Judge Amidon. • • •

To strike down this inspection law, instead of limiting the sphere of its operation, seems to me a serious curtailment of the functions of the state, *and leaves the farmers of North Dakota defenseless against what are asserted to be persistent, palpable frauds.*"

The above language by Mr. Justice Brandeis, it is confidently urged, conforms more closely to the views of the present prevailing majority of this Court.

Our contention in this matter is fortified by the opinion of this Court in *Townsend* v. *Yeomans*, 301 U. S. 441, 57 S. Ct. 842. In that case this Court considered a statute of Georgia fixing maximum charges for handling and selling leaf tobacco. Suit was filed by certain tobacco warehousemen in the Federal District Court to restrain enforcement of the State law on the grounds that it was a burden upon interstate commerce. It was conceded that practically all tobacco grown in Georgia went into interstate and foreign commerce. We quote from the opinion (301 U. S. text 455, 57 S. Ct. text 849):

"We are thus brought to the final contention of appellants that the State law although not in conflict with any exertion of Federal authority, must fall as being

repugnant to the existence of an exclusive Federal power although unexercised. The contention ignores the principle that this ground of invalidity is to be found only with respect to such matters as *demand a general system or uniformity of regulation; that in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act* (Cases cited).

In the instant case, the Georgia statute deals with a local need, exercising the state's protective power with respect to its own industry. A similar contention to that now advanced was held untenable in Munn *v.* Illinois, 94 U. S. 113, 27 L. Ed. 77, where state regulation of charges by the proprietors of grain elevators was sustained despite the fact that the elevators were used as instrumentalities by those who engaged in interstate commerce Id., 94 U. S. 113, at page 135, 24 L. Ed. 77. The point was again raised and overruled in Budd *v.* New York, 143 U. S. 517, 12 S. Ct. 468, 469, 36 L. Ed. 247, in upholding the New York statute regulating charges for 'elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses.' It was recognized that, in the actual state of the business, the passage of the grain to the city of New York and other places on the seaboard without the use of elevators would be practically impossible. The elevator at Buffalo was a link in the chain of transportation of the grain from the places where it was grown to the seaboard, but the Court said: 'So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state of New York. It operates *only within the limits of that state*, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in Munn *v.* Illinois. It is of the same character with navigation laws in respect to navigation within the state, and laws regulating wharfage rates within the state, and other kindred laws.' Id., 143 U. S. 517, at pages 544, 545, 12 S. Ct. 468, 36 L. Ed. 247. Again in Brass *v.* North

Dakota, 153 U. S. 391, 14 S. Ct. 857, 38 L. Ed. 757, the statute of that state 'regulating grain warehouses and weighing and handling of grain' was held not to amount to a regulation of commerce between the states in the absence of a conflict with federal legislation, upon the authority of the Munn and Budd cases.

All these decisions but illustrate the principle that the mere existence of the congressional power, no conflict with its exercise being shown, does not deprive the states of their authority *to safeguard their local interests by legislation* which does not directly burden transactions in interstate or foreign commerce.

The cases upon which appellants rely are distinguishable. In Dahnke-Walker Company *v.* Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239, the statute held to be invalid imposed burdensome conditions upon the enforcement of rights arising from transactions in interstate commerce. In Lemke *v.* Farmers' Grain Co., 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458, *the North Dakota statute of 1919* (Laws 1919, c. 138) *disclosed a comprehensive scheme to regulate the buying of grain in the course of interstate commerce.*''

The legislature of Florida found that the local grapefruit growers were threatened with extinction. They had been long oppressed by the canners, who had consistently, year after year, whittled down the price of the raw product and increased their own margin of profit to such point that they were able to pay the grower *just what they wanted the grower to have.* The entire industry was on the verge of collapse due to the inability of the grower to break even. The market conditions, about which plaintiffs exhort in their complaint, were largely caused by the unfair trade practices of the canners and their distributors, whose collective conscience was not at all stultified although they were choking the grower to death. Congress had failed to do anything about it and in such case, as pointed out by Mr. Justice Brandeis in his minority opinion in the *Lemke*

case, the State legislature was at liberty to deal with the critical condition which existed and alleviate the plight of the producer.

It is respectfully submitted (1) that the instant Act operates prior to the entry of the commodity into interstate commerce and (2) that even if the product was a part of interstate commerce it would still not be violative of the Federal Constitution because the Act does not impose any burden upon such commerce and because Congress has not legislated upon the subject.

IV. The Act Does Not Discriminate Against Plaintiffs, But Even If It Does, Plaintiffs Are Not Denied Equal Protection.

The complaint alleges that "many growers" process their raw product through their own canning plants while other growers can their own products through the medium of cooperative organizations (R. 5). It is alleged that "by reason of the foregoing facts", the canned product was being offered for sale "at prices which do not net the grower 32¢ per box on the tree" (R. 5). This was said to be discriminatory against plaintiffs. Such allegations are at best equivocal. It is not directly alleged that the grower *is not paid* his 32¢ per box whether his product is canned through his own canning plant or through the cooperative. Only the left-handed allegation is made that such product is being sold at prices which would not net the grower 32¢ per box. But the testimony was even weaker. Mr. Lindsey did not know whether the growers who owned canning plants had distinct corporate entities for the ownership of their plants and of their grove properties or not (R. 60). Nor did he know anything whatever regarding the legal setup of the cooperatives (R. 59-60). Mr. Elder gave no evidence concerning cooperatives (R. 63-67). On

the other hand Mr. J. F. Mays positively stated that the Act was being enforced against the cooperatives and grower canners the same as against the independent canners (R. 38-39). Mr. John A. Snively, President of a cooperative canning association, made affidavit that when his association could not sell the canned product at a price that would return the grower 32¢ a box, the association merely put the canned goods in storage. But he admitted that the canning cooperatives could pay the grower 32¢ per box by taking a loss on operation (R. 71-72), and Mr. Ralph Polk, Sr., stated that it was impossible for any canning corporation to know whether it was going to make a profit or sustain a loss by paying the grower 32¢ a box *until after the end of the season* (R. 73).

Thus the testimony fell short of showing even any appreciable difference, much less discrimination, between the enforcement of the Act against plaintiffs and against the cooperative or grower canners.

But the opinion of the court took a viewpoint on the question different from that alleged in the complaint or proved by the evidence. The opinion said that the testimony showed the cooperatives did not pay cash for their fruit to the grower, but merely "credited them" with 32¢ per box and "were not expected to pay (that much) for it unless the market prices enabled them to pay it" (R. 80). The opinion further held that the Commissioner did not enforce the law against the cooperatives but did enforce it against the independents and that the Commissioner "must have construed the Act so as to authorize him to do this" (R. 80).

Without discussing here the utter lack of support for the court's findings [11], it is respectfully submitted that, even

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[11] The accuracy of the findings made by the Court has been heretofore discussed, see p. 42, *et seq., supra.*

assuming such facts to exist, there is no unlawful discrimination against plaintiffs in violation of their rights under the equal protection clause of the Fourteenth Amendment. In the first place the court did not find as a fact that the members of the cooperatives would *not receive their 32¢ per box.* The finding was only that the cooperative was *not expected* to pay the grower his cost of production *unless the market prices enabled such payment. Non constant* market prices by the end of the season might be such as to enable the grower to receive *more* than 32¢. Can discrimination be assumed because of mere conjecture? Suppose the grower *did* receive his 32¢ per box at the end of the season from the cooperative, what would happen to the law in the meanwhile? It would be poor consolation to the grower of grapefruit in Florida to know ultimately that there had been no discrimination, if the Act had already long before been knocked out because of a *supposed or possible discrimination.* A "perchance" discrimination cannot be made the basis of a claim that equal protection is denied.

But the contention of discrimination must be dismissed upon still broader grounds. The Equal Protection Clause of the Federal Constitution merely requires State laws of like application to apply to *all persons similarly situated.* See *Barrett* v. *State of Indiana,* 229 U. S. 26, 33 S. Ct. 692; *Borden's Farm Products Co.* v. *Ten Eyck,* 297 U. S. 251, 56 S. Ct. 453. In the *Ten Eyck* case this Court sustained the milk control law of New York which authorized the State Board to fix a *differential* on the minimum prices at which milk could be sold to stores by milk dealers. Under the law milk dealers having a "well-advertised trade name" were required to sell their milk at a price of one cent per quart *more* than the minimum price prescribed for other independent milk dealers not having a "well-advertised trade name". The only distinction between the two classes of dealers was the existence of

the "well-advertised trade name". They were all independent milk dealers. We quote from the opinion (297 U. S. text 261, 56 S. Ct. text 455):

> "We hold that the fixing of the differential in favor of the sellers of milk not having a well-advertised trade-name, in the situation exhibited by the findings, does not deny the appellant equal protection.
>
> * * * Judicial inquiry does not concern itself with the accuracy of the legislative findings, but only with the question whether it so lacks any reasonable basis as to be arbitrary. Standard Oil Company *v.* Maryville, 279, U. S. 582, 586, 587, 49 S. Ct. 430, 73 L. Ed. 856."

The *Ten Eyck* case was previously before this Court as *Borden's Farm Products Co.* v. *Baldwin,* 283 U. S. 194, 55 S. Ct. 187, wherein the cause was remanded with directions to make findings of fact and conclusions of law after hearing evidence upon the issues joined. But in the *Baldwin* case the equal protection feature was commented upon. We quote in part from the opinion (293 U. S. text 209, 55 S. Ct. text 192):

> "When the classification made by the legislature is called in question, *if any state of facts reasonably can be conceived* that would sustain it, there is a *presumption* of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary (Cases cited). The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court."

In *Currin* v. *Wallace,* — U. S. —, 59 S. Ct. 379, the Supreme Court upheld as not discriminatory a Federal Act subjecting plaintiffs therein, as tobacco warehouse men, to certain inspection and certification with respect to sales conducted in their warehouses, even though other warehouse

men were doing the same sort of business in the same State and competing for patronage among the same growers as the plaintiffs without being subject to the Act.

Plaintiffs in the instant case make no contention that all independent canners are not treated alike, and hence, under the foregoing decisions, they cannot complain that the Act is discriminatory or that they are deprived of equal protection. Plaintiffs contended that the Commissioner was construing the Act not to apply to the cooperatives, and the opinion of the court seems to sustain such contention (R. 80). But even if so, the case would fall under the rule that "Mere errors of judgment by officials will not support a claim of discrimination. Moreover, it is not enough to show that a law or ordinance has not been enforced against other persons as it is sought to be forced against the person claiming discrimination. To establish arbitrary discrimination inimical to constitutional equality there must be something more, something which in effect amounts to an *intentional* violation of the essential principle of practical uniformity," and the presumption is always in favor of honest purpose in the administration. *12 American Jurisprudence: "Constitutional Law", Sec. 566; Mackay Telegraph & Cable Co.* v. *City of Little Rock,* 250 U. S. 94, 63 L. Ed. 863, 39 S. Ct. 428; *Sunday Lake Iron Co.* v. *Wakefield Township,* 247 U. S. 350, 62 L. Ed. 1154, 38 S. Ct. 495; *Concordia Fire Insurance Co.* v. *People,* 292 U. S. 535, 78 L. Ed. 1411, 54 S. Ct. 830. And in other cases, this Court has held that if the State enforcement officer goes beyond the terms of the statute, he acts as a private citizen and not a State officer, and in such event the State courts, not the Federal courts, should be looked to for redress.

Barney v. *City of New York,* 193 U. S. 430, 25 S. Ct. 502;

Elgin National Watch Co. v. *Illinois Watch Case Co.,* 179 U. S. 665, 21 S. Ct. 270;

Leschen & Sons Rope Co. v. *Broderick & Bascom Rope Co.*, 201 U. S. 166, 26 S. Ct. 425;

Home Telephone & Telegraph Co. v. *City of Los Angeles*, 227 U. S. 278, 33 S. Ct. 312.

In the recent case of *United States* v. *Rock Royal Co-Op.*, — U. S. —, 59 S. Ct. 993, this Court considered the validity of a certain order issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act regulating the handling of milk in the New York Metropolitan area. The United States sought by mandatory injunction in the District Court to coerce obedience to said order on the part of certain milk dealers. The District Court dismissed the complaint of the government. Upon appeal, this Court reviewed the many contentions made against validity of the order, including a contention made by an independent milk dealer that the order was unreasonably discriminatory because the cooperative dealers were not required to pay producers a uniform price whereas the independent dealers were so required by terms of the order. The direct point was there contended, which is now contended by plaintiffs in the instant case. In dismissing such contention, this Court in the *Rock Royal* case held: [12]

> "Certain provisions of the Order were found by the District Court to show unconstitutional discrimination against one or more of the defendants. The discriminations of which complaint is made arise from the application of the New York problem of Section 8c (5) of the Act relating to milk:
>
> A. *Uniform Price.* The Jetter Dairy Company, a proprietary handler, urges that *as milk cooperatives*

[12] The opinion in the *Rock Royal* case listed the cases supporting the text in marginal notes, therefore the quotation from the opinion as above given refers only to the *holdings* of previous cases. But the citations thereof may be derived from the margin of the opinion.

need not pay producers a uniform price, it is unreasonably discriminatory and violative of the due process clause of the Fifth Amendment to require it to pay this uniform price. In Section 8c (5) (F) there is a definition of the type of cooperative permitted to settle with its members in accordance with the membership contract. *The general characteristics of cooperatives are well understood.* The Capper-Volstead Act defines such cooperatives as associations of producers, corporate or otherwise, with or without capital stock, marketing their product for the mutual benefit of the members as producers with equal voting privileges, restricted dividends on capital employed and dealings limited to 50 per cent non-member product. Different treatment has been accorded marketing cooperatives by State and Federal legislation alike. Indeed the Secretary is charged by this Act to 'accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.' These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock. *The distinctions between such cooperatives and business organizations have repeatedly been held to justify different treatment. Frost* v. *Corporation Commission in fact recognized the validity of such classification.* The Commission was enjoined from isguing a license for the operation of a cooperative cotton gin under a proviso directing it to do so on petition of 100 citizens and taxpayers without the showing of public necessity required for other ginners. The applicant was organized for profit, though dividends were limited, and its membership was not confined to producers. The court thought the distinctions had no reasonable relation to the subject of the legislation, special opportunities for cooperatives. It was said the court had 'no reason to doubt' that the classification was valid as applied to true cooperatives.

The producer cooperative seeks to return to its members the largest possible portion of the dollar necessarily spent by the consumer for the product with deductions only for modest distribution costs, without profit to the membership cooperative and with limited profit to the stock cooperative. It is organized by producers for their mutual benefit. For that reason, it may be assumed that it will seek to distribute the largest amounts to its patrons.

The commodity handled by a cooperative corresponds for some purposes to the capital of a business corporation. Either may cut sale prices below cost, one as long as its members will deliver, the other as long as its assets permit. When proprietary corporations lower sales prices, they naturally seek to lower purchase prices. Their profit depends on spread, On the other hand, the cooperative cannot pass the reduction. All the selling price less expense is available for distribution to its patrons. As its own members bear the burden of price cutting, it was reasonable to exempt it from the payment of the fixed price. The cooperative member measures his return by the market or uniform price the business handler pays. In commodities with the wide market of staple dairy products, quotations are readily available. If distributions do not equal open prices, the cooperators' reaction would parallel those of stockholders of losing businesses. Neither the Act nor the Order protects anyone from lawful competition, nor is it essential that they should do so. *We do not find an unreasonable discrimination in excepting producers' cooperatives from the requirement to pay a uniform price.*"

The tenth headnote of the *Rock Royal* case is as follows:

"The provision of milk marketing order issued by Secretary of Agriculture excepting producers' cooperatives from requirement to pay a uniform price is not unreasonably discriminatory, *in view of distinctions between cooperatives and business organizations.*"

Florida has by statute since 1917 provided expressly for the formation of "cooperative associations". See Sections 6385 to 6390, Compiled General Laws of Florida, 1927. Also by Chapter 9300, Laws of Florida, Acts of 1923, the Florida legislature specifically provided for the formation of cooperative marketing associations for the distribution and marketing of agricultural products. This Act is shown as Sections 6466 to 6494 inclusive, Compiled General Laws of Florida, 1927.

Without further argument it is respectfully submitted: (1) the facts found by the three-Judge Court in its opinion do not show discrimination in fact, and (2) that even if discrimination in enforcement between the cooperative canners and the independent canners were shown, such discrimination would not be sufficient to deny the independent canners equal protection under the Federal Constitution.

V. The Price Fixing Feature of the Act Does Not Infringe Against the Fourteenth Amendment

Plaintiffs in their complaint wax eloquent in their denunciation of the law as a legitimate exercise of the State's police power. They say the law is unreasonable, arbitrary, vague, prejudicial, deprives plaintiffs of their property without due process of law, and impairs the freedom of contract (R. 5, 11, 14, 17, 35, 36). All of these contentions boiled down mean simply that the State, in the exercise of its broad police powers over a major State industry, has no authority to fix a minimum price to be paid to the producer for his raw product in years of emergency, such minimum prices to be merely his cost of production. The burden of plaintiffs' allegations is that the canners "at the current market prices" stand to lose money if they have to pay the grower 32¢ per box. The canners say that if anyone must take a loss it must be the grower, notwithstanding the grower, as the producer of the raw article, is primarily

responsible for the perpetuation of the industry. This is the gist of all of the voluminous allegations in the complaint. But when it came to the testimony, upon which the court acted in knocking out the law, plaintiffs did not make as strong a showing as they did in their complaint. The testimony of Mr. Ralph Polk, Sr. was to the effect that *none of the independent canners would know, if they paid the grower 32¢ a box, whether they would make a profit or sustain a loss, until after the season was over* (R. 73).

The court in its opinion held that the legislature of Florida was without power to authorize the fixing of a cost of production and to prescribe that the grower must in any event receive that amount for his fruit in years of emergency (R. 80). The court was of the opinion that the return to the grower must be determined by the law of supply and demand and could not be dealt with by legislative fiat. The court held that the price of 32¢ per box fixed by the Florida Citrus Commission was unreasonable and arbitrary because the canner could not pay the grower such amount "without sustaining a loss" (R. 79). The court also grounded its conclusion that the law was "arbitrary and prejudicial" upon the theory that a grower might be able to receive $8,000 for his crop which cost him $10,000 to produce, yet under the Act would "lose the whole crop". It is unnecessary to dwell upon this last observation of the court because no growers were in court complaining.

The point here involved presents for consideration the question of the authority of the State legislature to authorize the fixing, in years of emergency, within its major industry, of a minimum price to be paid to producers in that industry, which minimum price covers only the cost of production. There is more argument in support of the provisions of the instant law than in the usual so-called price fixing laws. There are two features of the instant Act which renders it less vulnerable to attack. First, the Act only

operates in those years when the citrus industry in Florida, which emergency must be found and proclaimed by the joint action of the Governor and Commissioner of Agriculture of Florida; and second, in such years of emergency the Act only attempts to guarantee the producer a return equal to his cost of production.

The instant Act was not designed to provide the producer with any margin of profit for his product. The Act was merely intended to preserve the industry by enabling the producer to survive in those years when he was threatened with extinction. The Florida Citrus Commission, which under the Act determines the cost of production after an emergency has been proclaimed, is by statute composed of "eleven practical citrus fruit men" all resident citizens of Florida who have been actively engaged in the citrus business in that State for not less than five years prior to appointment, and who have derived their major income from the industry. Chapter 16,854, Laws of Florida, Acts of 1935, as amended by Chapter 17,775 Laws of Florida, Acts of 1937. Members of the Commission are State officers under the Act. The power is thus reposed in responsible hands.

The general subject of price fixing in State Regulatory Acts has been the source of much litigation, as well as contrariety of opinion, in this Court.

The earlier decision of this Court, while not so important as the later ones, should be briefly reviewed in tracing the legal philosophy of this Court on the question.

In the case of *Munn* v. *People of Illinois*, 94 U. S. 113, 24 L. Ed. 77, decided in 1877, this Court upheld as constitutional a State statute of Illinois fixing the maximum charges for the storage of grain in warehouses in cities of Illinois having not less than 100,000 inhabitants. The Act was attacked on the ground it violated the interstate commerce clause and the Fourteenth Amendment. After reviewing

the extent of the exercise of the police power to regulate industries for the public good, this Court stated:

"From this it is apparent that, down to the time of the adoption of the 14th Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The Amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. * * *

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle. * * * For our purposes we must assume

that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner. * * *

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even thought it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the Legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the Legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to

which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But the mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts."

The opinion in the *Munn* case, *supra*, was written by Mr. Chief Justice Waite with Mr. Justices Field and Strong dissenting.

The majority opinion in the *Munn* case was followed in principle in *Budd* v. *New York*, 143 U. S. 517, 36 L. Ed. 247, *Brass* v. *North Dakota*, 153 U. S. 391, 38 L. Ed. 758, and *Cotting* v. *Godard*, 183 U. S. 79, 46 L. Ed. 92. In the *Cotting*

case while the *power* of the legislature to prescribe charges for services rendered by the stockyards in the State of Kansas was upheld, it was held that such charges must be uniform as between the large and small operators.

In *C. B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 55 L. Ed. 328, this Court upheld an Iowa statute which precluded the railroad company from making the defense in negligence suits brought by employees that recovery was barred by acceptance of benefits under a contract of membership in its relief department. The Act was challenged on the ground that the statute violated the Fourteenth Amendment by reason of the restraint it laid upon the liberty of contract. Upon this point the opinion of this Court, written by Mr. Justice Hughes, says:

> "The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern; as, for example, the regulation of commerce with foreign nation and among the several States (cases cited).
>
> It is subject, also in the field of State action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances. Thus, in addition to upholding the power of the State to require reasonable maximum charges for public service (cases cited), and to prescribe the hours of labor for those employed by the State or its municipalities (cases cited), this Court has sustained the validity of State legislation in prohibiting the manufacture and sale of intoxicating liquors within the State (cases cited); in limiting employment in underground mines or workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day, except in cases of emergency (case cited); in prohibiting the sale of cigarettes without license (case cited); in requiring the redemption in cash of store

orders or other evidences of indebtedness issued in payment of wages (case cited); in prohibiting contracts for options to sell or buy grain or other commodity at a future time (case cited); in prohibiting the employment of women in laundries more than ten hours a day (case cited); and in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of the weight of the coal as originally produced in the mine: (case cited).

The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

The principle was thus stated in *McLean* v. *Arkansas*, *supra*, pp. 547, 548; 'The legislature, being familiar with local conditions, is primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power (cases cited). * * * If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to

enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public "within the scope of legislative power, the act must fail."

In *Settler* v. *O'Hara*, before this Court in April, 1917, a decision of the State Supreme Court of Oregon, affirming a decree of a lower State court refusing to enjoin the enforcement of an Oregon statute fixing a minimum wage for women, was affirmed by an equal division of this Court, 243 U. S. 629, 61 L. Ed. 937. Mr. Felix Frankfurter, now a Justice of this Court, was attorney for respondents before this Court seeking to uphold the validity of the State law.

In the case of *Adkins* v. *Children's Hospital*, 261 U. S. 525, 67 L. Ed. 785, decided by this Court in April, 1923, a congressional Act providing for the fixing of minimum wages for women and children in the District of Columbia, was held unconstitutional. Mr. Justice Sutherland wrote the majority opinion, while Mr. Chief Justice Taft wrote a dissenting opinion, concurred in by Mr. Justice Sanford, and Mr. Justice Holmes wrote a second dissenting opinion. Mr. Justice Brandeis took no part in the decision. The Act was attacked on the ground that it interfered with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. The dissenting opinions in the *Adkins* case is today the prevailing law.[13]

In *Charles Wolff Packing Company* v. *Court of Industrial Relations of the State of Kansas*, 262 U. S. 522, 67 L. Ed. 1103, a State law of Kansas providing for the fixing of wages in industries affected with a public interest was held unconstitutional, in opinion written by Mr. Chief Justice

[13] See *West Coast Hotel* case, *infra*, p. 104.

Taft, as a taking of property and infringement upon liberty of contract without due process of law, in violation of the Fourteenth Amendment.

In *Tyson, etc.* v. *Banton*, 273 U. S. 418, 47 S. Ct. 426, decided by this Court in February 1927, a State law of New York fixing a maximum charge at which ticket brokers could resell amusement or theatre tickets to the public was held to contravene the Fourteenth Amendment by unduly restricting the freedom of contract. The majority opinion was written by Mr. Justice Sutherland. Mr. Justices Holmes, Stone, Sanford, and Brandeis dissented with separate dissenting opinions being written by the first three named dissenting justices. A portion of the dissenting opinion of Mr. Justice Stone is considered pertinent (273 U. S. text 450, 47 S. Ct. text 435):

> "It is undoubtedly true as a general proposition that one of the incidents of the ownership of property is the power to fix the price at which it may be disposed. It may be also assumed that as a general proposition, under the decisions of this Court, the power of State governments to regulate and control prices may be invoked only in special and not well defined circumstances. But when that power is invoked in the public interest and in consequence of the gross abuse of private right disclosed by this record, we should make searching and critical examination of those circumstances which in the past have been deemed sufficient to justify the exercise of the power, before concluding that it may not be exercised here.
>
> The phrase 'business affected with a public interest' seems to me to be too vague and illusory to carry us very far on the way to a solution. It tends in use to become only a convenient expression for describing those businesses, regulation of which has been permitted in the past. To say that only those businesses affected with a public interest may be regulated is but another way of stating that all those businesses which may be

regulated are affected with a public interest. It is difficult to use the phrase free of its connotation of legal consequences and hence when used as a basis of judicial decision, to avoid begging the question to be decided. The very fact that it has been applied to businesses unknown to Lord Hale, who gave sanction to its use, should caution us against the assumption that the category has now become complete or fixed and that there may not be brought into it new classes of business or transactions not hitherto included, in consequence of newly devised methods of extortionate price exaction.

The constitutional theory that prices normally may not be regulated rests upon the assumption that the public interest and private right are both adequately protected when there is 'free' competition among buyers and sellers, and that in such a state of economic society, the interference with so important an incident of the ownership of private property as price fixing is not justified and hence is a taking of property without due process of law.

Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, *so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community.* Whether this situation arises from the monopoly conferred upon public service companies or *from the circumstances that the strategical position of a group is such as to enable it to impose its will in matters of price upon those who sell,* buy or consume, as in Munn *v.* Illinois, *supra;* or from the predetermination of prices in the councils of those who sell, promulgated in schedules of practically controlling constancy, as in German Alliance Ins. Co. *v.* Kansas,

supra; or from a housing shortage growing out of a public emergency as in Block *v.* Hirsh, 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165; Marcus Brown Co. *v.* Feldman, 256 U. S. 170, 41 S. Ct. 465, 65 L. Ed. 877; Levy Leasing Co. *v.* Siegal, 258 U. S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (cf. Chastleton Corp. *v.* Sinclair, 264 U. S. 543, 44 S. Ct. 405, 68 L. Ed. 841)—*the result is the same. Self-interest is not permitted to invoke constitutional protection at the expense of the public interest and reasonable regulation of price is upheld.*"

In *Ribnik* v. *McBride,* 277 U. S. 350, 48 S. Ct. 545, decided by this Court in May, 1928, a State statute of New Jersey conferring upon a State officer the power to fix prices which employment agents could charge for their services was held to violate the due process clause of the Fourteenth Amendment. The majority opinion was written by Mr. Justice Sutherland while Mr. Justice Stone wrote a dissenting opinion concurred in by Mr. Justice Holmes and Mr. Justice Brandeis. Mr. Justice Sanford concurred in the majority opinion upon the controlling authority of *Tyson* v. *Banton,* in which case he had dissented. The majority opinion in the *Ribnik* case, as in the earlier cases, grounded its judgment striking down the State law on the theory that the business attempted to be regulated was not affected with a public interest. We again quote from a portion of Mr. Justice Stone's dissenting opinion (277 U. S. text 359, 48 S. Ct. text 547):

> Under the decisions of this Court not all price regulation, as distinguished from other forms of regulation, is forbidden. As those decisions have been explained, price regulation is within the constitutional power of a State Legislature when the business concerned is 'affected with a public interest.' That phrase is not to be found in the Constitution. Concededly it is incapable of any precise definition. It has and can have only

such meaning as may be given to it by the decisions of this Court. As I read those decisions, such regulation is within a State's power whenever any combination of circumstances seriously curtails the regulative force of competition, *so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a Legislature might reasonably anticipate serious consequences to the community as a whole* (Cases cited). *The price regulation may embrace businesses 'which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation'* (Case cited). The use by the public generally of the specific thing or business affected is not the test. The nature of the service rendered, the exorbitance of the charges and the arbitrary control to which the public may be subjected without regulation, are elements to be considered in determining whether the 'public interest' exists. *Wolff Co.* v. *Industrial Court, supra*, 538 (43 S. Ct. 630). *The economic disadvantage of a class and the attempt to ameliorate its condition may alone be sufficient to give rise to the 'public interest' and to justify the regulation of contracts with its members.* (Knoxville Iron Co. *v.* Harbison, *supra;* McLean *v.* Arkansas, *supra;* Mutual Loan Co. *v.* Martell, *supra*), and obviously circumstances may so change in point of time or so differ in space as to clothe a business with such an interest which at other times or in other places would be a matter purely of private concern. (Block *v.* Hirsh, *supra*, 155 (41 S. Ct. 458)). * * *

Some presumption should be indulged that the New Jersey Legislature had an adequate knowledge of such local conditions as the circumstances of those seeking employment, the number and distribution of employment agencies, the local efficacy of competition, the prevalent practices with respect to fees. On this deserved respect for the judgment of the local lawmaker depends, of course, the presumption in favor of constitutionality, *for the validity of a regulation 'turns 'upon the existence of conditions, peculiar to the busi-*

ness under consideration.' Tyson *v.* Banton, *supra*, 438 (47 S. Ct. 431). Moreover, we should not, when the matter is not clear, expose our notion of the seriousness of the problem or the necessity of the legislation to that of local tribunals. 'This Court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.' Adkins *v.* Children's Hospital, 261 U. S. 525, 544, 43 S. Ct. 394, 396 (67 L. Ed. 785, 24 A. L. R. 1238). And the enactments of State Legislatures are entitled to no less respect."

In *Williams* v. *Standard Oil Company*, 278 U. S. 235, 49 S. Ct. 115, decided by this Court in January, 1929, a State statute of Tennessee providing for the fixing of prices for gasoline was held invalid as the taking of property without due process of law contrary to the Fourteenth Amendment. The majority opinion, written by Mr. Justice Sutherland, held that the business of selling gasoline was not affected with a public interest, following the reasoning of the majority opinions in the previously cited case. Mr. Justice Holmes dissented while Mr. Justice Brandeis and Mr. Justice Stone concurred in the result.

The trend of the legal philosophy of this Court, foreshadowed by the strong dissenting opinions in the foregoing cases, was shown in the case of *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 51 S. Ct. 130, decided in January, 1931, wherein a New Jersey statute, limiting an insurance agent's commission on fire insurance policies to a reasonable amount, not exceeding that paid other local agents, was upheld by this Court as against the contention that it denied due process of law. The majority opinion is by Mr. Justice Brandeis while Mr. Justices Van DeVanter, McReynolds, Sutherland and Butler dissented. The majority opinion held that the business of insurance was so far af-

fected with a public interest that the State could regulate the rates and likewise regulate the relations of those engaged in the business. We quote from the majority opinion (282 U. S. text 257, 51 S. Ct. 132):

> "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the Constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey *evils did not exist* in the business of fire insurance *for which this statutory provision was an appropriate remedy.* The action of the legislature and of the highest court of the State, indicates that *such evils did exist.* The record is barren of any allegation of fact tending to show unreasonableness."

In *Nebbia* v. *People of the State of New York*, 291 U. S. 502, 54 S. Ct. 505, an order of the Milk Control Board of the State of New York requiring milk distributors to charge 10 cents and storekeepers 9 cents per quart for sale of milk to consumers was held not unreasonable or arbitrary or a denial of due process of law to the storekeeper. Mr. Justice Roberts wrote the majority opinion while Mr. Justice McReynolds wrote a minority opinion, joined by Mr. Justices Van DeVanter, Sutherland, and Butler. The order which was upheld was pursuant to the authority contained in a State law of New York establishing a board with power among other things, to fix minimum and maximum retail prices to be charged by stores to consumers for milk. We quote excerpts from the majority opinion:

"Milk is an essential item of diet. It cannot long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase the cost of the business. *Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.*

The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately $1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.

In addition to the general price decline, other causes for the low price of milk include a periodic increase in the number of cows and in milk production, *the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets,* and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream.

The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. * * *

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid

for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. • • •

But we are told that because the law essays to control prices it denies due process. Notwithstanding the admitted power to correct existing economic ills by appropriate regulation of business, even though an indirect result may be a restriction of the freedom of contract or a modification of charges for services or the price of commodities, the appellant urges that direct fixation of prices is a type of regulation absolutely forbidden. His position is that the Fourteenth Amendment requires us to hold the challenged statute void for this reason alone. • • • But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. *The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago.* Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77. • • •

It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. Wolff Packing Co. *v.* Court of Industrial Relations, 262 U. S. 522, 535, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280. The phrase 'affected with a public interest' can, in the nature of things, *mean no more than that an industry,*

for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expression 'affected with a public interest,' and 'clothed with a public use,' have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed as business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. *But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells.* • • • Where the public interest was deemed to require the fixing of minimum prices, that expedient has been sustained. If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interest, produce waste harmful to the public, *threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself,* appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted *fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public.* And this is especially so where, as here, the economic maladjustment is one of price, *which threatens harm to the producer at one end of the series and the consumer at the other.* The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

The *Nebbia* case, while it did not so declare in words, completed a definite swing of the judicial opinion of this Court to the doctrine long contended for by the minority in the many cases previously decided by this Court and hereinbefore cited.

In the case of *Hegeman Farms Corporation* v. *Baldwin, et al.*, 293 U. S. 163, 55 S. Ct. 7, an order of the New York Milk Control Board, issued under the same Act upheld in the *Nebbia* case, requiring a wholesale milk dealer to pay to producers the difference between what he had actually paid them and what he was required to pay them under a previous price fixing order, as a condition for reinstatement of license as a milk dealer, was upheld as against the contention that it violated the Fourteenth Amendment. In the *Hegeman Farms* case one of the contentions seriously urged upon this Court was that the milk dealers there involved could not pay to the producer the price fixed in the Board's order *without losing money*, and the comment of this Court upon such contention is illuminating in the light of similar contentions made by one or two of the plaintiffs in the instant case as a principal basis of their attack on the Act here involved. We quote:

> "The appellant's grievance amounts to this, that it is operating at a loss, though other dealers more efficient or economical or better known to the public may be operating at a profit. * * *
>
> True the appellant is losing money under the orders now in force. For anything shown in the bill it was losing money before. For anything there shown other dealers at the same prices may now be earning profits; at all events they are content, or they would be led by self-interest to raise the present level. We are unable to infer from these fragmentary data that there has been anything perverse or arbitrary in the action of the board. To make the selling level higher might be unfair to the consumers; to make the purchasing level

lower might bring ruin to producers. *The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts.* If the designation of a minimum price is within the scope of the police power, *expenses or losses made necessary thereby must be borne as an incident;* unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged. The Fourteenth Amendment does not protect a business against the hazards of competition. Public Service Comm. of Montana *v.* Great Northern Utilities Co., supra, at page 135 of 289 U. S., 53 S. Ct. 546. It is from hazards of that order, and not from restraints of law capriciously imposed, that the appellant seeks relief. The refuge from its ills is not in constitutional immunities. * * *

True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race. Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned. To pass judgment on it, there is need that the field of vision be expanded to take in all the contestants in the race for economic welfare, and not some of them only. The small dealer may suffer, *but the small producer may be helped, and an industry vital to the state thus rescued from extinction.* Such, at any rate, is the theory that animates the statute, if we look to the official declaration of the purpose of its framers. Nebbia *v.* People of State of New York, supra, pages 515, 516 of 291 U. S., 54 S. Ct. 505. The question is not for us whether the workings of the law have verified the theory or disproved it. At least, a law so animated is rescued from the reproach of favor-

itism for the powerful to the prejudice of the lowly. If the orders made thereunder are not arbitrary fiats, the courts will stand aloof."

In *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 57 S. Ct. 578, decided in March, 1937, by opinion of Mr. Chief Justice Hughes, this Court upheld an Act of the State of Washington creating a State Commission with power, among other things, to fix minimum wages for women and minors employed in that State. The ground of attack was that it violated the Fourteenth Amendment by abridging the freedom of contract. Mr. Justice Sutherland wrote a dissenting opinion, concurred in by Mr. Justices Van De-Vanter, McReynolds and Butler. The majority opinion exhaustively reviewed the earlier decisions, particularly that of *Adkins* v. *Children's Hospital, supra.* The court expressly overruled the majority opinion in the *Adkins* case and adopted the minority views expressed by Mr. Justices Taft and Holmes therein. The burden of the minority opinion in the *West Coast Hotel* case was that the majority opinion in the *Adkins* case was good law and should be adhered to. While the *West Coast Hotel* case was a *wage* fixing Act dealing with the relation of employer and employee, as distinguished from a *price* fixing law dealing with the sale of a commodity, the principle is the same. In fact, this Court in the *West Coast Hotel* case cites and quotes from many of the earlier price fixing cases, such as the *Nebbia* case, as authority for its holding. The opinion in the *West Coast Hotel* case is rather lengthy and, in view of the extended quotations made from the earlier cases, need not be quoted from here. Suffice to say that, like the *Nebbia* case and the *O'Gorman* case, the *West Coast Hotel* case adopted as the prevailing view of the court the principles contended for in the minority opinions in the previous cases.

In *Townsend* v. *Yeomans, supra,* decided in May, 1937, this Court, in opinion of Mr. Chief Justice Hughes, upheld a Georgia statute fixing maximum charges for the handling and selling of leaf tobacco by warehousemen. The statute was assailed as an arbitrary and capricious exercise of State power, in violation of the Fourteenth Amendment. This Court said:

> "So far as the present controversy turns upon the power of the state to give this sort of protection to this industry, provided its regulation is not arbitrary or confiscatory and in the absence of conflict with the federal power over commerce, our rulings are decisive in support of the state action. * * * Appellants contend that the legislative action was taken without investigation and hence must be considered to be arbitrary and beyond the legislative power. There is no principle of constitutional law which nullifies action taken by a legislature, otherwise competent, in the absence of a special investigation. The result of particular legislative inquiries through commissions or otherwise may be most helpful in portfaying the exigencies to which the legislative action has been addressed and in fortifying conclusions as to reasonableness. Nebbia *v.* New York, *supra,* 291 U. S. 502, at page 516, *et seq.,* 54 S. Ct. 505, 507, *et seq.,* 78 L. Ed. 940, 89 A. L. R. 1469. But the Legislature, acting within its sphere, is presumed to know the needs of the people of the state. Whether or not special inquiries should be made is a matter for the legislative discretion. Here, the existence of the industry, highly important to the state, the transactions in the tobacco markets, *the necessity of protecting the growers from exorbitant warehouse charges,* must be presumed to have been fully known to the members of the Legislature and this presumption cannot be overthrown, as it has been sought to be overthrown, by testimony of individual legislators."

In *Highland Farms Dairy, Inc.* v. *Agnew,* 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835, decided in March, 1937, a State

law of Virginia creating a Commission with power among other things to fix "market areas" within the State and to fix minimum and maximum prices to be charged for milk and cream therein, was upheld by this Court in opinion written by Mr. Justice Cardozo, wherein Mr. Justices Van De-Vanter, McReynolds, Sutherland and Butler dissented. It was said by this Court that "The power of a state to fix a minimum price for milk *in order to save producers,* and with them the consuming public, *from price cutting so destructive as to endanger the supply*", had been affirmed in the *Nebbia* case, the *Hegeman Farms Corporation* case and the *Ten Eyck* case. Both the opinion of this Court and also the opinion of the lower Court (16 F. Supp. 575) give full summaries of the Virginia Act involved. This Court will particularly observe that the preamble to that Act, containing findings made by the legislature, *follows very closely the preamble to the instant Act.*

The influence of the recent decisions of this Court has been plainly exhibited in the late decisions of the lower Federal Courts (except in the instant case). Thus in *Feldman* v. *City of Cincinnati,* 20 F. Supp. 531, the District Court upheld as against challenge under the Federal Constitution, an Ordinance of the City of Cincinnati prescribing hours during which barber shops may be open for business. In *Paramount Picture* v. *Langer,* 23 F. Supp. 890, the District Court upheld as against attack under the Fourteenth Amendment a State statute of North Dakota prohibiting the operation of motion picture theatres which were owned, controlled, managed, or operated, in whole or in part, by producers or distributors of motion picture films. The Circuit Court of Appeals for the First Circuit has recently, on June 13, 1939, upheld the Constitutional validity of an Act of Porto Rico, and regulatory order issued thereunder, fixing the price of sugar. *Vidal* v. *Fernandez,* 104 F. (2d) 606. And

District Judge Stephens of the Southern District Court of California in *Bristol Myers Company* v. *Tischauser*, 18 F. Supp. 228, refused injunction to restrain enforcement of the California Fair Trade Act which prohibits the retailing of factory marked goods in competition through regular course of business at less than factory fixed prices, either by one contracting to maintain the price, or by one who has secured the goods from other than factory sources. In the course of his opinion Judge Stephens made the following observation which might well apply to the three-Judge Court below:

> "Laws enacted to meet new conditions in our complex and changing civilization come in contact with judicial minds long accustomed to certain economic practices and conceptions and are very apt to be pressed to the ordeal of squaring with such practices and conceptions in their test of constitutionality. This practice constitutes nothing less than extra judicial exercise of the veto power."

Under the later cases decided by this Court, it is doubtful if necessary that a business be shown to be affected with a public interest in order to sustain a price fixing statute regulating such business. The rule now is that "price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Nebbia* case *supra*. But the instant Act may be sustained whether tested upon the standard just quoted or upon the standard of whether the business is affected with a public interest.

In *Sligh* v. *Kirkwood*, *supra*, this Court in 1915 took judicial notice that the citrus industry in Florida was a major industry. If the citrus industry was a major industry in 1915, it is certainly a major industry today,

twenty-five years later. It clearly is a business affected with a public interest in Florida.

The Florida Supreme Court, in the case of *Miami Home Milk Producers Assn.* v. *Milk Control Board,* 124 Fla. 797, 169 So. 541, upheld the validity of a State law creating a milk control board in Florida with power to fix the minimum price at which milk might be sold. The Act there involved contained a preamble setting forth a legislative finding of facts very similar to the finding of facts made in the preamble to the instant Act (169 So. 541). It was held that the legislative determination of such facts must be upheld by the Courts unless plainly contrary to common knowledge or clearly shown by allegation and proof to be false. The price fixing features of the Act were upheld upon authority of the foregoing decisions of this Court.

Also in *Miami Laundry Company* v. *Florida Dry Cleaning & Laundry Board,* 134 Fla. 1, 183 So. 759, the Florida court upheld, as against attack under the due process clause of the Fourteenth Amendment, a State law creating a State Laundry Board with power, among other things, to fix a schedule of prices to be charged for laundry and dry cleaning service within the State. The laundry business was held to be clothed with or affected with, a public interest, at least that it was of such proportion that the interest of the public demanded that it be reasonably regulated even to the point of price fixing.

From all the foregoing decisions, it is respectfully submitted that the feature of the instant Act authorizing the determination and fixing of a cost of production which the grower must be guaranteed in years of emergency should be sustained. If the laundry business in Florida is affected with a public interest, or if the conditions within that industry are such as to make reasonably necessary a law containing the authority to fix prices, then certainly the busi-

ness of raising and producing citrus fruit in Florida is a business affected with a public interest and subject to at least equal regulation.

The Act only guarantees to the grower what it actually costs him in dollars and cents to produce his current crop. The Act only operates in years of emergency and such emergency must be found and declared by the Governor and Commissioner of Agriculture. A competent State authority is designated to determine the cost of production when the emergency is declared. If the canners made previous contracts at prices which would not enable them to pay the grower his cost of production, such fact cannot avail the canner as an argument against the validity of the law. In the first place, he knew the law was on the books when he made his contract. The law was passed in 1935. He made his contracts with full notice of the provisions of the law and with full knowledge that in any season an emergency might arise which would call for the invocation of the law. In the second place, and possibly more fundamental, the canner is in a decidedly awkward position to insist that his contract be upheld when he admits that the price therein fixed for the processed product was such that the grower would not be paid what it actually cost him to produce the fruit, although at the same time the canner was allowing for himself a nice margin of profit. This is an instance of the very unconscionable trade practices and trade conditions and evils within the industry that brought about the passage of the law. To sustain the contentions of the canners, that because they cannot make a profit if they have to pay the grower his cost of production and therefor the Act is unconstitutional, would be to place unrestricted power in the hands of the canner to completely frustrate any legislative attempt to protect the grower. All the canner would ever have to do would be

to so pad or juggle his operating cost, or for that matter to increase his margin of profit, to such extent as to leave a balance for the grower below the cost of production. In other words, what the canner says now, that he cannot make a profit and pay the grower 32¢ per box, is what he can say in any year under any contracts he has outstanding. He would merely have to figure his operating cost or his margin of profit at such a figure as would leave an insufficient amount for the grower. Statutes are not declared unconstitutional upon such a shallow premise.

The legislative findings of fact, stated in the preamble to the instant Act, are clearly ample to show a condition within the industry that sustained this character of regulation. The citrus industry is the largest production industry in Florida. The legislature found that the grower had been crushed under the oppressive practices of the canner and shipper almost to the point of extinction. This Act stands as a bulwark for the protection of the grower. While he is still at the mercy of the dealer as to what margin of profit he might make, he at least knows he can live.

It is unnecessary to dwell at length upon the contention made that the fixing of 32¢ per box as the cost of production was so unreasonable as to constitute a denial of property rights without due process of law (R. 13). The record shows that the Commission proceeded properly in ascertaining what was a fair figure. Five affidavits on behalf of defendants attest to this fact (R. 36-44). Not a word of testimony was adduced to the contrary by plaintiffs. The Regulation on its face, as unanimously adopted by the Commission, also shows a careful compliance with the law. Even the three-judge court found no fault with the Commission in its method of arriving at the cost price.

It is submitted that both the Act and the Regulation are constitutional and do not infringe upon the rights of plaintiffs under the Fourteenth Amendment.

VI. The Court Should Not Have Enjoined Enforcement of the Regulation in Absence of Affirmative Showing of Non-Compliance With the Act in Promulgating Same

The court below held in its opinion that the Commissioner must be enjoined from enforcing "the fixed price" because there was "no proof in the record" that the Commission had obtained a consent and agreement to abide by the Regulation from those not subject thereto (R. 80).

The Act in this particular is admittedly rather vague. It provides that after an emergency has been declared the Citrus Commission shall proceed with its duties in determining and fixing the cost of production (R. 19). Among those duties is to procure "from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms" (R. 19). The Regulation as adopted recites that "The Florida Citrus Commission has determined that all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said Act". By this declaration the Florida Citrus Commission made a determination of fact that there were no persons in the industry from whom it was necessary to procure agreements as mentioned in the Act. Whether there *might* be such persons *in other years or under other conditions* is immaterial to a consideration of the point. The fact here presented is that the Commisison determined that, at the particular time this Regulation was adopted and under the particular circumstances then obtaining within the industry, all handlers, (and of course all producers) in Florida were subject to the Act. This was certainly just as strong as if any of such members of the industry had signed agreements to abide by the Regulation. The Commission merely stated that all handlers, whether they wanted to or not, or

whether they would otherwise be subject to the Act or not, would be bound automatically by the Regulation. In any event, the independent canners were in no position to complain. They did not state to the court what handlers not subject to the Act had failed to sign binding agreements. They did not take issue with the determination of the Commission that all handlers were subject to the Act.

Also it is submitted that this particular provision of the Act is not mandatory but merely directory. The local law would prevail in the construction of said provision, and the Supreme Court of Florida, in *Apgar* v. *Wilkinson*, 95 Fla. 457, 116 So. 78, has held that similar wording in a statute merely constitutes an authorization or clothing of State officers with power and authority to do the things enumerated rather than to impose mandatory duties. It was held that "Where mandatory words or provisions are written in statutes defining the duties of administrative officers, such words or provisions may be construed as directory only, unless something in the body of the act is indicative of the contrary view".

In the second place, it seems frankly apparent that such language in the instant Act is meaningless. Certainly all producers, shippers, or handlers of citrus fruit in Florida are subject to the Act. And if they are so subject to the Act they are bound by the provisions thereof by the terms of the Act itself and no necessity arises for procuring any binding agreements from any of them or to indulge in any attempted supertechnical analysis of the Act to determine what the language meant. Again resorting to the local rule of construction, the Supreme Court of Florida, in *Therrell* v. *Smith*, 124 Fla. 197, 169 So. 388, held that where a proviso can be given no sensible effect, or is so worded that it cannot be with certainty said to mean any particular thing, it shall and will be entirely disregarded.

In the third place, the matter is not one for Federal jurisdiction. If the Florida Citrus Commission has proceeded contrary to the face of the Act, it is a matter for the State courts and not the Federal courts. See *Barney* v. *City of New York, supra, Home Telephone & Telegraph Company* v. *City of Los Angeles, supra.* No ground of Federal jurisdiction can be predicated upon such alleged wrongful action of the State Commission.

The District Court in its opinion held that there was "no proof in the record" (R. 80) that the Commission had secured such consent and agreement from producers and others not subject to the provisions of the Act, and that because of such lack of proof, the State Commissioner should be enjoined from enforcing "the fixed price". It was held that while this feature of the case might not render it violative of the Constitution it would "certainly" require injunction. The District Court thus applied a wholly untenable rule in placing the burden upon the *proponents* of the State law to show their *right* of enforcement, rather than upon those *challenging* the States law to show why enforcement should be restrained. Merely to say there was no proof in the record that the Commission had acted in pursuance of the law was not to deny that the Commission had acted lawfully.

It is respectfully submitted (1) that the proof before the court was ample to show that the Commission *had* proceeded properly, and (2) that if the Commission had in fact not proceeded properly the burden was upon the plaintiffs challenging the Regulation to show such fact of non-compliance, and (3) in the absence of proof either way, the court should have ignored such contention, and (4) it was a matter for the local courts, not the Federal courts to determine.

VII. The Court Should Not Have Granted Interlocutory Injunction

The order granting the interlocutory injunction recited affirmatively on its face that it was being granted "for the reasons to be expressed in an opinion to be filed later" (R. 75). The opinion which was filed later discussed *exclusively* the constitutionality [14] of the Act and after holding the Act invalid on several grounds the opinion stated: "We therefore conclude that the injunction should be granted" (R. 81). By these statements contained in the court's own order and opinion, it conclusively appears that the interlocutory injunction was granted *solely because the Act was unconstitutional.* This being so, if the lower court was in error in its judgment on the constitutional question, it would follow that the interlocutory injunction should not have been granted. Where the reason for an order of court falls the order itself falls.

Aside from this, however, a consideration of the entire record demonstrates that the interlocutory injunction should have been denied. The court was dealing with a seasonal subject matter. And it was at the *critical time of the season* that the court was called upon to issue the interlocutory order.

The existence of a State emergency in the citrus industry had been proclaimed by the Governor and Commissioner of Agriculture on January 13, 1939 (R. 31). Acting promptly, the Florida Citrus Commission, on January 16, 1939, promulgated the Regulation fixing the cost of production (R. 32). The Regulation was, by its terms, to become effective January 20, 1939. But plaintiffs waited until

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[14] The only exception is the point discussed under the last preceding section of the brief (pp. 111-113), but it does not alter the argument here made.

March 23, 1939 (R. 1), over two months later, before they filed their complaint in court alleging that the Act and Regulation were unconstitutional. The three-judge court did not convene until April 10, 1939 (R. 45), and the order granting interlocutory injunction was not filed until April 28, 1939 (R. 75-76). The canning season runs from about November until the following June or July (R. 6).

The foregoing facts should have operated to make the court exercise care before issuing an interlocutory injunction. The court must have realized that such an order would, so far as the current season is concerned, have the full effect of a permanent injunction. The delay in filing the suit was entirely the fault of plaintiffs and at the hearing plaintiffs showed no facts whatever in excuse or explanation of their delay. Nor did they show any great and irreparable injury which they would suffer by reason of the Act, even if they had been diligent in filing the suit. The growers had already suffered from March 23rd to April 28th, by a suspension of the enforcement of the Act through a restraining order issued without notice (R. 32-33).

Rules governing the granting or denying of an interlocutory injunction are too well known to be repeated here. Suffice to say that, guided by such rules and exercising the discretion vested in equity courts in such cases, the interlocutory injunction here should have been denied.

One other point in this connection should be mentioned. The complaint prayed injunction against the Commissioner of Agriculture from proceeding under the Bond and License law to revoke or suspend plaintiffs' licenses as citrus fruit dealers or attempting so to do (R. 17). It was contended by plaintiffs that the Commissioner was "without authority whatsoever to revoke the licenses of these plaintiffs or either of them for their failure to comply with the provisions of the Growers' Cost Guarantee Act or the Regula-

tion promulgated thereunder" (R. 16). A copy of the Bond and License law is appended to the bill (R. 20). It is but necessary to call attention of this Court to Section 8 of said Act (R. 27), which provides in part that "whenever the Commissioner determines that any citrus fruit dealer * * * has violated any of the provisions of any other law of the State of Florida governing and applicable to citrus fruit dealers * * * he may * * * suspend the license of such offender for a specific period, or revoke the same * * * and any such order shall specify the effective date thereof" (R. 27). The same section of the Act makes any such order of the Commissioner reviewable by a court of competent jurisdiction (R. 28). The Growers' Cost Guarantee law provides that whenever the cost of production has been fixed as therein provided, every contract with the grower for the purchase, marketing or processing of his fruit shall be held to require the payment to him of such cost price (R. 20). It is also provided that "any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful * * *" (R. 20). It is difficult to perceive upon what basis plaintiffs contended the Commissioner had no right to revoke their licenses upon their refusal to pay the grower 32¢ per box in accordance with the Act and Regulation. It was not only the Commissioner's *right* to do so; it was his *positive duty* under the Bond and License law.

It is respectfully submitted that the interlocutory injunction should not have been granted because: (1) the sole reason assigned by the court for granting the injunction falls if the Act be here adjudged constitutional, and (2) even pretermitting consideration of the constitutional question, plaintiffs made no proper showing under the circumstances of the case for the issuance of such order.

Conclusion

Appellants apologize for the prolixity of this brief, but at the risk of being tedious we have endeavored to present fully our views of the law of the case, both as it pertains to the citrus industry of Florida and also as a matter of judicial precedent. The Act has a distinctly beneficial, and we believe, a constitutional, field of operation. It is submitted that the order and judgment of the District Court appealed from should be reversed.

Respectfully submitted,

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APPENDIX "A"

Growers' Cost Guarantee Law

Chapter No. 16862

Laws of Florida—Acts of 1935

AN ACT relating to citrus fruit: Prescribing conditions nd limitations upon the sale, marketing and processing greements.

WHEREAS, it is found by the Legislature and hereby de- ared that the production and distribution of citrus fruit a paramount industry in Florida upon which the prosper- y of the State in a large measure depends; that such fruit nd the juices thereof have become and are generally used great and rapidly increasing quantities, both voluntarily nd upon advice of physicians, by people of all classes, ages nd conditions; that it is necessary for the reasonable com- ort, welfare, and health of the people and in order to build p their strength and vigor that an adequate and dependa- le supply of high grade citrus fruit be constantly available, nd the production, transportation, processing, distribution nd sale of citrus fruit in the State of Florida is therefore ereby declared to be a business affecting the public health nd interest, that unfair, unjust, destructive, demoralizing, nd uneconomic trade practices have been and continuing be carried on in the sale and distribution of citrus fruit this state to the extent that such fruit has been and is ontinuing to sell in many cases at prices below the cost of roduction and the constant, dependable and adequate sup- ly of such fruit for sale and consumption is thereby so eriously imperiled as to threaten the break down of the in- ustry; that the present acute economic condition in Flor- da is in part the consequence of a severe and increasing dis- arity between the prices of citrus fruit and other commodi- es; that it is both expedient and necessary to build up he quality and reputation of Florida's citrus fruit in the arket and to stabilize the Florida citrus industry and to rotect the public and the growers against fraud, deception, nd financial loss through further continuation of unscru-

pulous practices and haphazard methods in connection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

THEREFORE, in the exercise of the police power of the State for the purpose of protecting and promoting the public health and general welfare,

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

Section 1. This Act shall be known and called the Growers Cost Guarantee Act.

Section 2. The term "Citrus Fruit" as used herein means and includes only the fruits Citrus Grandis, Osbeck, commonly called grapefruit, and Citrus Sinensis, Osbeck, commonly called oranges, and Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

The term "standard packed box" means 1⅗ bushels whether in bulk or in a container.

Section 3. The Commisssioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitions signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time to time may make, and after the Citrus Commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the average reasonable cost per standard packed box of producing cutrus fruit and every contract, agreement, plan or arrangement with the grower by

or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production, to be ascertained by multiplying the said cost per standard packed box as shown by the record of the Commission current at the time the contract, agreement, plan of arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

Section 4. The provisions of this Act shall apply to any one or more of the citrus varieties embraced hereunder as may be determined by the petitions and agreements provided for in the foregoing section.

Section 5. This Act shall become effective immediately upon becoming a law.

Approved June 8, 1935.
Filed in Office Secretary of State June 8, 1935.

APPENDIX "B"

Resolution & Order

Whereas, Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, by and with the consent and advice of Honorable Fred P. Cone, Governor of the State of Florida, has by proclamation dated the 13th day of January, A. D. 1939, declared the existence of a State emergency in the citrus industry, under authority of Chap-

ter 16862, Laws of Florida, Acts of 1935, known as the Grower's Cost Guarantee Law; and

Whereas, petitions signed by persons, firms, corporations and associations, which this Commission finds own or control 50% or more of the producing acreage of citrus fruit and 50% or more of the producing acreage of grapefruit in the State of Florida, have been presented requesting the Florida Citrus Commission to determine and record in permanent form the average reasonable cost per standard packed box of producing grapefruit; and

Whereas, the Florida Citrus Commission has determined that all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said act; and,

Whereas, the Florida Citrus Commission, based upon said proclamation of the Commissioner of Agriculture and the Governor of Florida, and upon said petitions, having proceeded as authorized and required by said Chapter 16862, Laws of Florida, Acts of 1935, hereby determines and records in permanent form the average reasonable cost per standard packed box of producing grapefruit to be thirty-two (32¢) cents for the citrus fruit season 1938-39;

Now, Therefore, the Florida Citrus Commission does hereby find, determine and order that the average reasonable cost per standard packed box of producing grapefruit is thirty-two (32¢) cents and that said price be recorded in permanent form for the season 1938-39 and that every contract, agreement, plan or arrangement with the grower by or under which his grapefruit shall be bought, marketed or processed shall be held to require that the person, firm, corporation or association buying, marketing or processing said grapefruit shall in any event pay the grower said cost of production as herein ordered and as provided in Chapter 16862, Laws of Florida, Acts of 1935.

The foregoing resolution and order are unanimously adopted and promulgated by the Florida Citrus Commission in open meeting duly assembled in Lakeland, Florida, on this the 16th day of January, A. D., 1939, and shall be-

come effective at 12:01 a. m. Friday, January 20th, A. D. 1939.

FLORIDA CITRUS COMMISSION,
By JOHN MAXCY,
Chairman.

Attest:
CHAS. F. CHASTAIN,
Secretary.

(Seal.)

APPENDIX "C"

Bond and License Act

Chapter No. 16860, Laws of Florida—Acts of 1935

As Amended by Chapter No. 17777, Acts of 1937

An Act Relating to the purchase, handling, sale and accounting of citrus fruit grown in the State of Florida; to prevent fraud and deception therein; to provide for the licensing and bonding of citrus fruit dealers; to prescribe certain powers and duties of the Commissioner of Agriculture of the State of Florida in the administration and enforcement of this act; and to prescribe penalties for the violations of the provisions of this Act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. That as used in this Act:

(a) The term "person" means and includes individuals, firms, partnership, association, corporation, and any other business unit.

(b) The term "citrus fruit" means and includes only the fruit Citrus Grandis, Osbeck, commonly called grapefruit, and/or Citrus Sinensis, Osbeck, commonly called Oranges, and/or Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

(c) The term producer means and includes any person engaged in the business of growing and/or producing citrus fruit.

(d) The term "consignor" means and includes any person other than a producer who ships or delivers to any commission merchant, or dealer any citrus fruit for handling, sale or resale.

(e) The term "commission merchant" means and includes any person engaged in the business of receiving any citrus fruit for sale, on commission or for or on behalf of another.

(f) The term "consignment shipper" means and includes any person who contracts with the producer of citrus fruit for the marketing thereof for the sole account and risk of such producer and who agrees to pay such a producer the net proceeds derived from such sale.

(g) The term "cash buyer" means and includes any person who purchases any citrus fruit in Florida from the producer thereof for the purpose of resale.

(h) The term "broker" means and includes any person engaged in the business of negotiating the sale or purchase of any citrus fruit.

(i) The term "agent" means and includes any person, who on behalf of any one citrus fruit dealer, negotiates the consignment or purchase of any citrus fruit.

(j) The term "dealer" means and includes every person other than a producer, consignor, commission merchant, consignment shipper, cash buyer, broker, or agent who in any manner makes or attempts to make money or any other thing of value on any citrus fruit by dealing in the same in any manner whatsoever.

(k) The term "citrus fruit dealer" means and includes every consignor, commission merchant, consignment shipper, cash buyer, broker, agent association, cooperative association, and dealer, as herein above defined.

(l) The term "Commissioner" means the Commissioner of Agriculture of the State of Florida.

(m) The term "standard packed box" means one and three-fifths (1⅗) bushels of citrus fruit whether in bulk or in container.

(n) The term "shipping season" means and includes that period of time commencing July 1 of one year and ending June 30 of the following year.

Section 2. That no person shall act as a citrus fruit dealer without having obtained a license as provided in this Act. That any person desiring to engage in the business of citrus fruit dealer in the State of Florida shall make application to the Commissioner for a license. The Commissioner may by regulation prescribe the information to be contained in such application. Upon the filing of the application, and annually thereafter, the applicant shall pay to the Commissioner a fee of Ten Dollars except that where any applicant expects to deal only as an agent, as defined herein, such applicant shall pay the sum of Five Dollars. All such license fees collected hereunder shall be paid by the Commissioner into the State Treasury monthly to the Credit of the General Inspection Fund. Said fees shall be kept in said General Inspection Fund and are hereby appropriated and made available for defraying the expenses incurred in the administration and enforcement of this Act.

Section 3. That before any license is granted by the Commission to any person other than an agent as defined in this Act, the applicant therefor must deliver to the Commissioner a good and sufficient cash bond or surety bond executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety, in the amount of Ten Dollars for each one thousand standard packed boxes of citrus fruit that the said applicant intends to deal with during the next twelve months, as set forth in his application up to and including one million standard packed boxes of citrus fruit; provided, however, that no bond shall be less than Five Hundred Dollars in amount nor greater than Ten Thousand Dollars in amount. Said bond shall be in the form approved by the Commissioner and shall be conditioned upon compliance with the provisions of this Act, and upon faithful compliance with the conditions of all contracts, verbal or written, made by the citrus fruit dealer with producers relative to the purchase, handling, sale and accounting of sales of citrus fruit and upon applicant accounting for the proceeds of any citrus fruit contracted for in accordance with the terms of the contracts with producers. Said bond shall be to the Commissioner and his successors in office, in favor of every

producer with whom applicant deals in the purchase, handling, sale and accounting of sales of citrus fruit. The aggregate accumulated liability under any such bond shall not exceed the amount named therein. Every such bond shall continue in force and effect until ninety days after the termination of the shipping season for which the bond is given. Any producer claiming to be injured or damaged by any act of said citrus fruit dealer, or the Commissioner on behalf of all producers contracting with the said citrus fruit dealer, may maintain an action on said bond against the citrus fruit dealer and the surety named in said bond, or either of them, and any judgment against the citrus fruit dealer, and/or surety in any such action shall include costs.

In cases where liability under and by virtue of any bond given pursuant to the provisions hereof is admitted, without suit and the amount or amounts admitted to be due are paid to the Commissioner, the Commissioner is authorized and directed to ascertain the amount or amounts due the claimant or claimants who has or have duly filed a claim or claims under and in connection with such bond prior to the expiration of ninety days immediately following the end of the shipping season for which such bond was given, and thereafter the Commissioner shall make distribution of the amount or amounts so paid to him under such bond to the extent that the same may reach in satisfying such claim or claims; provided, however, that where there are two or more claimants who have duly filed claims within the time last aforesaid that aggregate an amount in excess of the amount or amounts held by the Commissioner for distribution, such claimants shall participate in the proceeds of such funds in the hands of the Commissioner only on a pro rata basis, and no one of such claimants shall receive any preference over the others by reason of having filed his claim prior to the filing of the claims of the others.

Section 4. That it shall be unlawful in, or in connection with, any transaction relative to the purchase, sale and accounting of sale and handling of citrus fruit:

1. For any citrus dealer to make or exact any fraudulent charge to and/or from any person.

2. For any citrus dealer to reject or fail to deliver in accordance with terms of the contract without reasonable cause any citrus fruit bought or sold or contracted to be bought or sold by such citrus fruit dealer.

3. For any citrus fruit dealer to discard, dump or destroy without reasonable cause any citrus fruit received by such citrus fruit dealer.

4. For any citrus fruit dealer to make, for a fraudulent purpose any false or misleading statement concerning the condition, quality, quantity, or disposition of or the condition of the market for, any citrus fruit which is received by such citrus fruit dealer or bought or sold or contracted to be bought or sold by such citrus fruit dealer; or the purchase or sale of which is negotiated by such citrus fruit dealer; or to fail or refuse truly and correctly to account promptly in respect of any such transaction in any such citrus fruit to the person with whom such transaction is had.

5. For any citrus fruit dealer to knowingly buy, sell, receive, process or handle stolen citrus fruit.

Section 5. Whenever an applicant has paid the prescribed fee, the Commissioner shall issue to such applicant a license which shall entitle the licensee to do business as a citrus fruit dealer unless and until it is suspended or revoked by the Commissioner in accordance with the provisions of this Act but said license shall automatically terminate unless the annual fee is paid within thirty days after notice has been mailed that payment is due.

Section 6. That if any citrus fruit dealer violates any provisions of this Act he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation. Such liability may be enforced either (1) by complaint to the Commissioner, as hereinafter provided, or (2) by suit in any Court of competent jurisdiction; but this Section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this Act are in addition to such remedies.

Section 7. That any person complaining of any violation of any of the provisions of this Act by any cirtus fruit

dealer during any shipping season may at any time prior to the expiration of ninety days immediately following the end of such shipping season apply to the Commissioner by petition, which shall briefly state the facts, whereupon, if in the opinion of the Commissioner the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commissioner to the citrus fruit dealer, who shall be called upon to satisfy the complaint or to answer it in writing within a reasonable time to be prescribed by the Commissioner. After an opportunity for hearing on a complaint the Commissioner shall determine whether or not the citrus fruit dealer has violated any of the provisions of the Act. If after hearing on a complaint made by any person under this Section the Commissioner determines that the citrus dealer has violated any provision of this Act, he shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If any citrus fruit dealer does not comply with an order for the payment of money within the time limited in such order, the complainant or any person for whose benefit such order was made, may, within ninety days from the date of the order file in any Court of competent jurisdiction a petition or declaration setting forth briefly the causes for which he claims damages and the order of the Commissioner in the premises. Such suit in such Court shall proceed in all respects like other civil suits for damages, except that the findings and order of the Commissioner shall be prima facie evidence of the facts therein stated, and the petitioner or plaintiff shall not be liable for costs in such Court nor for costs in any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner or plaintiff finally prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

Section 8. That whenever the Commissioner determines that any citrus fruit dealer violated any of the provisions of this Act or has violated any of the provisions of any other

law of the State of Florida governing and applicable to citrus fruit dealers as herein defined, he may publish the facts and circumstances of such violation and/or by order, suspend the license of such offender for a specific period, or revoke the same or make such other appropriate order as he may deem just and proper, and any such order shall specify the effective date thereof and any order other than one suspending or revoking a license shall automatically suspend such license until said order is complied with. That any action of the Commissioner with reference to the revocation or suspension of any license granted under the provisions of this Act, may be reviewed by any Court of competent jurisdiction.

Section 9. That every citrus dealer shall make and keep a correct record showing in detail the following with reference to the purchase, handling, sale and accounting of sale of citrus fruit handled by him, namely:

(a) The name and address of the producers or other persons from whom the citrus fruit was produced, and if same was procured from some other than a licensed handler, the name and address of the producer of said fruit.

(b) The date citrus fruit is received and the amount thereof, and the purchase price paid therefor if purchased for the purpose of resale.

(c) The condition of such citrus fruit upon receipt by the citrus fruit dealer.

(d) If the citrus fruit is handled on consignment for the account of the producer, the date of sale and the selling price.

(e) An itemized statement of the charges to be paid by the producer in connection with any sale.

(f) A detailed statement of all claims made by producers against the citrus fruit dealer, a copy of each when received to be certified to and filed with the Commissioner.

(g) A copy of the record and account of sales of citrus fruit handled on consignment and/or commission shall be delivered to the producer upon the consummation of the sale, together with all moneys received by the citrus fruit dealer in payment for such transaction made upon account of the

producer, less the agreed commission and other charges which must be separately itemized, and payment and accounting must be made by said citrus fruit dealer to the producer within fifteen days after said citrus fruit dealer received the money in payment of said citrus fruit unless otherwise specified in contract between citrus fruit dealers and producer.

Section 10. That in the investigation of complaints under this Act the Commissioner, or his duly authorized agents, shall have the right to inspect such accounts, records, and memoranda of any citrus fruit dealer as may be required for the determination of any such complaint. If any such citrus fruit dealer refuses to permit such inspection, the Commissioner may publish the facts and circumstances and/or by order suspend the license of the offender until permission to make such inspection is given.

Section 11. That the Commissioner, or any officer or employee designated by him for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, receive evidence and require by subpoena the attendance and testimony of witnesses and the production of such accounts, records and memoranda as may be material for the determination of any complaint under this Act. In case of disobedience to a subpoena of the Commissioner, or any of his officers or employees, may invoke the aid of any Court of competent jurisdiction in requiring the attendance and testimony of witnesses and the production of accounts, records and memoranda and any such Court may in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring the person to appear before the Commissioner, or his agents or employee or to produce accounts, records, and memoranda as so ordered, or to give evidence touching any matter pertinent to any complaint and any failure to obey such order of the Court shall be punished by the Court as a contempt thereof.

Section 12. That the commissioner may make such rules, regulations and orders as may be necessary to carry out the provisions of this Act and may cooperate with any department or agency of the United States Government.

Section 13. That any person who acts as a citrus fruit dealer as defined in this Act without a license, or having a license, violates or aids in the violations of any provision of this Act, or any person who represents himself as a citrus fruit dealer but who is not a citrus fruit dealer as defined in this Act, shall for each and every offense be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not exceeding $1000.00 or by imprisonment in the county jail for more than six months or by both such fine and imprisonment in the discretion of the Court. Civil suits and criminal prosecutions arising by virtue of any of the provisions of this Act may be instituted in the County where the said citrus fruit was received by the citrus fruit dealer, or in the County in which the principal place of business of such citrus fruit dealer is located within the State of Florida, or within the County in which the violation of this Act occurred, or if such violation occurs in more than one county, then within any county in which such violation of this Act occurred.

Section 14. That the several Circuit Courts of the State of Florida, sitting in Chancery, are hereby vested with jurisdiction specifically to enforce and to enjoin and restrain any citrus fruit dealer from violating, the provisions of this Act, or of any rule, regulation or order made by the Commissioner pursuant to this Act in any proceeding brought by the Commissioner in any of said Circuit Courts; and in any such proceeding it shall not be necessary for the Commissioner to allege or prove that an adequate remedy at law does not exist.

Section 15. That it shall be the duty of each state and/or county law enforcement officer to make arrests for violation of this Act when notified of such violation by the Commissioner of Agriculture, or his authorized agent, inspector or representative.

Section 16. That this act shall be liberally construed and if any part or portion thereof be declared invalid, or the application thereof to any person, circumstance or thing is declared invalid, the validity of the remainder of this Act and/or the application thereof to any other person,

circumstance or thing shall not be affected thereby and it is the intention of the Legislature to preserve any and all parts of said Act if possible.

Section 17. That all laws or parts of laws in conflict herewith and the same are hereby repealed.

Section 18. That this Act shall take effect immediately upon its passage and approval by the Governor, or upon becoming a law without such approval.

(5228)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 270

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

LAKELAND HIGHLANDS CANNING CO., INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

A reply brief on behalf of Appellants in any case is generally (and usually by necessity) rather sketchy and disjointed. Each topic hereinafter discussed will be appropriately catch-lined and numbered.[1-2]

[1] Wherever page numbers are mentioned without further designation, it will be understood as referring to such pages in Appellees' brief. Pages in the transcript of record will be referred to as usual (R. —). Pages from Appellants' original brief and other documents on file in this cause will be specifically designated.

[2] On page 2 of Appellees' brief, it is indicated that Appellees at the time of filing their brief did not have copy of Appellants' original brief. We presume this statement was an inadvertence, inasmuch as Appellees did have a copy of Appellants' brief, which fact is conclusively shown throughout Appellees' brief.

1. **Correct copying of Act involved.** The Act as copied and made Exhibit "A" to the complaint (R. 18) does not contain fully the title. Between the word "processing" and the word "agreements" the following language is omitted: "thereof, and the effect of contracts of sale and of marketing and processing". The correct title would then read: "AN ACT relating to citrus fruit; Prescribing conditions and limitations upon the sale, marketing and processing thereof, and the effect of contracts of sale and of marketing and processing agreements." The same omission occurs where the Act is copied as Appendix "A" in the original brief for Appellants (See page 118, Appellants' brief). The importance of the omitted language is obvious.

The preamble to the Act, containing the legislative findings of fact, is also not copied correctly in all places. The opinion of the court set out the Act in its entirety with the exception of Sections 1 and 2, but in copying the preamble the following language is omitted in the third clause between the words "citrus fruit" and the words "in the State of Florida": "be constantly available, and the production, transportation, processing, distribution and sale of citrus fruit". The same omission is, of course, contained in the copy of the opinion included as an Appendix to Appellees' brief on page 87 thereof. The importance of this omitted language from the preamble is likewise obvious.

For the convenience of the court, we append hereto, as Appendix "A", a complete and correct copy of the Act in its entirety.

It is interesting to observe that in the opinion of the Court declaring the Act unconstitutional, the Act itself was not correctly included. This undoubtedly was by inadvertence, but the omitted portion is vital as a finding of fact by the legislature. Several of the decisions sustaining various price fixing laws cited in Appellants' original brief were

grounded upon the very fact of insuring an adequate and dependable supply of the particular product involved in the law. See the extracts from the *nebbia* case, the *Hegeman Farms* case, and the *Agnew* case, quoted on pages 101, 103 and 106 of appellants' original brief. See also the case of *Borden's Farm Products Company* v. *Ten Eyck*, 297 U. S. 251, 56 S. Ct. 453.

2. **Act operates prospectively only, not retroactively.** It is alleged in the complaint (R. 16) that one of plaintiffs, prior to the adoption of the Regulation by the Florida Citrus Commission fixing the cost price, "had entered into binding contracts with growers of grapefruit in the State of Florida, whereby the growers of grapefruit agreed to furnish to said plaintiff approximately 60,000 field boxes of grapefruit at a price less than 32 cents per field box". It is further alleged that, *because of such Regulation*, said plaintiff had "been unable to accept said 60,000 boxes of grapefruit at the price set forth in said contract" (R. 16-17). In the testimony Mr. Elder, manager of said plaintiff corporation, testified that such contracts called for the payment to the grower of "20 cents on the tree for the large and 15 cents on the tree for the small" (R. 64). He also testified that the Regulation caused him to lose the profits that he would otherwise have made in the processing of fruit purchased under such existing contracts (R. 64). The opinion of the Court also at least implies that the price agreed upon in the existing contracts would be abrogated upon the adoption of the Regulation, causing the canner a loss in the sale of his processed product to the distributor under other contracts (R. 80). From all of this appellees contend that the promulgation of the Regulation fixing the cost price at a figure higher than the purchase price contained in pre-existing contracts with the growers impairs the obligation of such contracts (R. 17, 35).

Appellants respectfully submit that there is no impairment of the obligation of contract. Previous contracts are, in no wise affected. The Act operates only prospectively. The Regulation of the Commission recording the cost of production operates only prospectively. The Regulation could not affect contracts already in existence. If the Act or Regulation presumed to do so, it would be operating retroactively.

But a careful consideration of the Act itself shows that it was *intended* to operate only prospectively. This Court will observe from the Act that it is provided that the *amount* due a grower under a contract for the sale of his fruit is determined by multiplying the number of packed boxes of fruit therein sold by the cost price recorded by the Commission "*current at the time*" the contract with the grower is made (R. 20). Thus if any canner had made a contract with the grower prior to the time the Regulation was adopted, *there would have been no cost price recorded by the Commission "current" at that time.* Such cost price would become current *only upon the adoption of the Regulation.* This being true, much of appellees' argument is taken completely out of the case.

3. **Canners cannot urge contentions of invalidity on behalf of growers not joined.** Much of the complaint, Appellees' brief, and even the opinion of the Court, is devoted to the contention that the Act is invalid because of its effect upon the grower. The Court in its opinion even posed the hypothetical case of the grower with his $10,000 crop of grapefruit (R. 80).

The principle is established that the question of constitutionality can be raised only by one who is affected by the alleged unconstitutional law and *in the particular features of the law complained of.* Many cases are collected in *11 American Jurisprudence,* pages 748 *et seq., 6 Ruling Case*

Law, pages 89 *et seq.*, and in the *United States Supreme Court Digest*, Volume 8, pages 5737, *et seq.* In *Bourjois, Inc.* v. *Chapman et al.*, 301 U. S. 183, 57 S. Ct. 691, a manufacturer of cosmetics in New York, with customers in Maine, assailed a Maine statute regulating the sale of cosmetics, requiring a license of salesmen, etc., on the ground that it interfered with interstate commerce, but that point was overruled, and then the Court said:

> "Plaintiff urges that relief should be granted because the provisions of the statute concerning seizure and forfeiture of unregistered cosmetics violate the Constitution of Maine. To that claim it is a sufficient answer that if there is a wrongful seizure, it will be of goods belonging to others. For, as the bill and findings reveal, no goods of the plaintiff will ever be liable to seizure, since the plaintiff will have none in Maine. If under this statute the constitutional rights of others are violated by an unlawful seizure and forfeiture, they, and not the plaintiff, must seek the redress."

In *Monamotor Oil Company* v. *Johnson*, 292 U. S. 86, 54 S. Ct. 575, a gasoline distributor assailed a statute of Iowa levying an excise tax on gasoline. The Court said:

> "One who has not imported gasoline or distilled it from imported oil cannot complain that statute imposing license fee on imported gasoline is discriminatory."

In *Williams et al.* v. *Riley*, 280 U. S. 78, 50 S. Ct. 63, a law of California imposing a tax on motor vehicle operators was assailed by an operator of vehicles on the California highways, but the Court held that the plaintiffs, constituting only some of thosuands of people similarly situated, could not raise the question that the effect of the law was to exact tolls for the use of the highways, etc., saying:

> "Federal courts have no power per se to review and annul acts of state Legislatures on ground that they

conflict with federal or state Constitutions, but such questions may be considered only when justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest on such acts."

In *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 35 S. Ct. 167, a statute of the State of Ohio discriminating between shops employing five or more and those employing less than five, was involved. The suit was brought by an employer. The Court said:

> "The stress of the present argument, in the brief and at the bar, is upon the feature of the law which takes away the defense of contributory negligence from establishments employing five or more and still permits it to those concerns which employ less than five. Much of the argument is based upon the supposed wrongs to the employee, and the alleged injustice and arbitrary character of the legislation here involved, as it concerns him alone, contrasting an employee in a shop with five employees with those having less. *No employee is complaining of this act in this case.* The argument based upon such discrimination, so far as it affects employees by themselves considered cannot be decisive; for it is the well-settled rule of this court that it *only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of.*" (Italics ours.)

This is exactly what the canners in the instant case undertake to do on behalf of the growers.

In *Williams* v. *Walsh*, 222 U. S. 415, 32 S. Ct. 137, an Act of Kansas making it criminal to sell or deliver black powder for use in any coal mines in the State except in original sealed packages containing 12½ pounds of powder, was involved. The Court held that:

> "One who does not appear to have imported black powder from outside the state cannot raise the ques-

> tion of the validity under the commerce clause of the Federal Constitution of the provisions of Kan. Laws"—

involved. In the body of the opinion the Court, among other things said:

> "The act does not deal with importations, special or general, but only with sales within the State at a specified place, and the delivery at such place of the powder sold in other than a prescribed quantity and in a prescribed package,"

and that such packages might be prepared within the State or imported. See also *Meyer Const. Co.* v. *Corbett*, 7 F. Supp. 616.

And in *Detroit, Ft. W. & B. I. R. Co.* v. *Osborn*, 189 U. S. 383, 23 S. Ct. 540, 47 L. Ed. 860, it was held that the contention that a statute failed to provide for due notice to those who may be affected by its provisions and hence violated the Constitution, could not be raised by a person who had actually received notice.[3] There is no showing, contention or intimation anywhere in the transcript of record or in Appellees' brief that Appellees, or any of them, did not actually have notice and opportunity to be heard at and before the time the Regulation was adopted. In point of fact, the Appellees not only had such notice and opportunity for hearing, but actually participated in the investigation made by the Commission in arriving at the cost price.

4. **Considerations of questions of local law.** Appellees devote a section of their brief, pages 13 et. seq., to the proposition that the Court was not confined to considera-

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[3] This holding is doubly applicable to the instant case in that it also answers the elaborate contention made in Appellees' brief, at pages 54 et seq., that the Act is unconstitutional because it does not specifically provide for notice and hearing before adoption of the Regulation by the Citrus Commission. See infra, p. 30.

tion of the constitutional questions, but was at liberty to determine other questions of State or local law, even though the constitutional questions be decided adversely to Appellees or not decided at all. Appellees suggest three distinct questions of local law which it is contended the Court had jurisdiction to consider and which would warrant the injunctive relief sought from the three-judge court (page 14). These questions are elaborately argued (pages 77 to 85). Appellants submit that in this particular case the Court was without jurisdiction to consider such questions of local law for the following reasons:[4] (a) the requisite jurisdictional amount was not shown to be involved; (b) the Federal questions presented were not substantial; (c) even if the Federal questions were substantial, the Federal and local grounds were not in support of a single cause of action, but presented two separate and distinct causes of action; and (d) the local questions were not sufficiently raised in the complaint to enable the Court to consider them.

(a) THE REQUISITE JURISDICTIONAL AMOUNT WAS NOT SHOWN TO BE INVOLVED. We will not burden the Court on this point as the matter is fully covered in appellants' original brief (see pages 50 to 63 of appellants' brief). If appellants are correct in this contention, the District Court, of course, had no jurisdiction even to decide the Federal questions and therefore was precluded from deciding the local questions.

(b) THE FEDERAL QUESTIONS PRESENTED WERE NOT SUBSTANTIAL. Appellees (on page 13) cite four cases to sustain their contention that the District Court could consider and determine local questions. An analysis of these cases,

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[4] We here only consider the *right* of the Court to proceed to consideration of the local questions. What such determination on the merits should have been is hereinafter discussed, infra, p. 37.

together with consideration of other cases to be cited by appellants, will demonstrate that, even under such cases, the lower court should not have proceeded past the constitutional questions.

In the *Fisher* v. *Brucker* case, 41 F. (2d) 774, the District Court acquired jurisdiction upon two grounds, viz: (1) diversity of citizenship and (2) the presence of a Federal question. The Federal question presented raised the constitutionality of a State inheritance tax statute of Michigan. It was urged that the law was in conflict with the Fourteenth Amendment. A consideration of the opinion shows that the Federal question was substantial and in any event the Federal court acquired jurisdiction on the ground of diversity of citizenship.

The *Sterling* v. *Constantin* case, 287 U. S. 378, was an appeal from a permanent injunction issued by a three-judge District Court against the governor and other officials of the State of Texas. The governor had proclaimed "martial law" in certain oil producing areas in Texas and the injunction restrained the enforcement of certain military or executive orders restricting the production of oil in such areas. The governor and other State officials contended that certain sections of the State Constitution authorized the issuance of the executive proclamations. Plaintiffs in the case denied that the constitutional provisions authorized such action by the governor and urged that a construction of such provisions would demonstrate that no such authority was conferred. It was also urged that even if such constitutional provision did authorize the action taken by the governor, the executive order so issued thereunder violated rights of the plaintiffs under the Federal Constitution. Thus, both matters of Federal law and of State law were presented. This Court was urged to construe the State Constitution as a matter of local law, but the Court,

in opinion of Mr. Justice Hughes, refused to do so in the following language (287 U. S. text 396):

> "While we recognize the force of these observations, and the question of the interpretation of the provisions of the state constitution is before us, it is still a matter of local law, as to which the courts of the State would in any event have the final word. We do not find it necessary to determine that question and we shall not attempt to explore the history of Texas or to review the decisions of the state courts cited by the appellees. We pass to the consideration of the federal question presented, and for that purpose we shall assume, without deciding, that the law of the state authorizes what the Governor has done."

Further in the opinion the conclusion of this Court on the constitutional question was stated as follows (287 U. S. text 404):

> "• • • as the evidence showed that the Governor's orders were an invasion under color of state law of rights secured by the Federal Constitution, the District Court did not err in granting the injunction."

Thus this Court in the *Sterling* case specifically declined to pass upon the question of local law presented, but restricted its consideration to the Federal question.

The *Rice & Adams* v. *Lathrop* case, 278 U. S. 509, was a patent infringement case and is in nowise applicable to the particular point here involved.

The *Louisville & Nashville R. R. Co.* v. *Garrett* case, 231 U. S. 298, approaches the point more closely than any of the other three cases cited by appellees. In that case suit was brought in the District Court to enjoin the enforcement of certain orders made by the Railroad Commission of Kentucky prescribing maximum freight rates for certain intrastate traffic, and awarding amounts in reparation for pre-

vious excessive payments made to the carrier. The orders were made by the Railroad Commission under authority of a Kentucky statute. The bill attacked the statute and the orders of the Commission as violative of rights secured by the Federal Constitution. Objections were also made under the Constitution and statutes of the State. A three-judge District Court denied the motion for interlocutory injunction as to the right to consider the questions of local law, towit, the validity of the statute and orders under the State Constitution. This Court in opinion of Mr. Justice Hughes said (231 U. S. text 303, *et seq.*):

> "Because of the Federal questions raised by the bill the Circuit Court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. Siler *v.* Louisville & Nashville R. R., 213 U. S. 175, 191. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an appeal to this court. 36 Stat. 557. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its 'unconstitutionality.' The reference, undoubtedly, is to an asserted conflict with the Federal Constitution and the *question of unconstitutionality, in this sense, must be a substantial one.* But where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. The local questions arising under the state constitution and statutes were therefore before the Circuit Court and the appeal brings them here." (Italics ours)

But the Court further said (231 U. S. text 305):

> "So far as we are advised, the Court of Appeals of Kentucky has not passed upon the validity of the act in question; and this court has often expressed its reluctance to adjudge a State statute to be in conflict with the constitution of the State before that question has been considered by the State tribunals—to which it properly belongs—unless the case imperatively demands such a decision. Pelton *v.* National Bank, 101 U. S. 143, 144; Michigan Central R. R. Co. *v.* Powers, 201 U. S. 245, 291. Here, the argument against the statute is not of that compelling character."

In addition, however, to the four cases cited by appellees, certain other late decisions of this Court lend clarity to the point involved. These cases are *California Water Service Co.* v. *Redding,* 304 U. S. 252, 58 S. C. 865; *Levering & Garrigues* v. *Morrin,* 289 U. S. 103; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386; *Noriembega Co.* v. *Bennett,* 290 U. S. 598, and *Bianchi* v. *Morales,* 262 U. S. 170, 43 S. Ct. 526.

In the *California Water Service Company* case, suit was brought in the District Court to enjoin the City of Redding, California, from receiving a grant of money from a Federal authority acting under the National Industrial Recovery Act and supplemental legislation, the purpose of which grant was to aid the City in the construction of a Municipal Waterworks system. It was urged that the grant of Federal funds and the legislation authorizing the same were invalid under the Federal Constitution and that the grant of funds was in violation of the Federal statutes cited. The suit also sought to enjoin the City from expending proceeds from the sale of the City's bonds, which bond issue was challenged as invalid under the Constitution and Statutes of California. After the suit was filed, but before the hearing before the three-judge District Court upon motion

for interlocutory injunction, this Court handed down decision in the case of *Alabama Power Company* v. *Ickes*, 302 U. S. 464, which determined the Federal questions adversely to the plaintiffs in the *California Water* case. The District Court held that the Federal question *had become unsubstantial* in view of the *Alabama Power Company* decision and therefore "the charge that the bonds of the City were invalid under the State law presented a purely local issue which the court was not required to consider," 304 U. S. text 254. Upon appeal to this Court the question of the right of the District Court to consider the matters of local law was considered and ruled upon as follows (304 U. S. text 254):

> "We are of the opinion that these rulings were correct. We have held that § 266 of the Judicial Code does not apply *unless there is a substantial claim of the unconstitutionality of a state statute or administrative order as there described.* It is therefore the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, *to scrutinize the bill of complaint to ascertain whether a substantial Federal question is presented,* as otherwise the provision for the convening of a court of three judges is not applicable. Ex parte Buder, 271 U. S. 461, 467; Ex parte Poresky, 290 U. S. 30. We think that a similar rule governs proceedings under § 3 of the Act of August 24, 1937, as to the participation of three judges in passing upon applications for injunctions restraining the enforcement of Federal statutes upon the ground of constitutional invalidity. Had the decisions in the cases of Alabama Power Co. *v.* Ickes, *supra,* and of Duke Power Co. *v.* Greenwood County, 302 U. S. 485, been rendered prior to the filing of the bill of complaint in the instant case, *no substantial Federal question would have been presented. The lack of substantiality in a Federal question may appear either because it is obviously without merit or because its unsoundness so clearly*

results from the previous decisions of this Court as to foreclose the subject. Levering & Garrigues Co. *v.* Morrin, 289 U. S. 103, 105, 106. And, here, although the bill of complaint had been previously filed, and a motion for an interlocutory injunction presented, *it was apparent after our decisions in the cases cited that the Federal question was without substance* and it became the duty of the District Court to dismiss the bill of complaint upon that ground.

In Oklahoma Gas & Electric Co. *v.* Oklahoma Packing Co., 292 U. S. 386, 391, we had occasion to observe that 'the three judge procedure is an extraordinary one, imposing a heavy burden on Federal courts with attendant expense and delay'; that 'that procedure, designed for a specific class of cases, sharply defined, should not be lightly extended'; and that restrictions placed upon appellate review in this Court 'would likewise be measurably impaired were groundless allegations thus to suffice.' We concluded that 'when it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their action is no longer prescribed.'

It is also clear that the presentation of a local question in the instant case as to the invalidity of the City's bonds under the State law did not suffice to save jurisdiction. While, if the court had jurisdiction by reason of the presence of a substantial Federal question, it could proceed to pass upon the local issue (Louisville & Nashville R. Co. *v.* Garrett, 231 U. S. 298, 303; Davis *v.* Wallace, 257 U. S. 478, 482; Sterling *v.* Constantin, 287 U. S. 378, 393, 394; Railroad Commission *v.* Pacific Gas & Electric Co., 302 U. S. 388, 391), *it was the presence of the Federal question which gave the court that authority, and in its absence, through lack of substance, the court was not entitled to go further.* In Norumbega Co. *v.* Bennett, 290 U. S. 598, the District Court of three judges, considering that a Federal constitutional question was involved, passed upon the question of the construction of the State statute and, denying a motion to dismiss for lack of jurisdiction, dismissed the bill

of complaint for want of equity. 3 F. Supp. 500, 502. This Court reversed the decree and remanded the cause with directions to dismiss the bill of complaint for the want of jurisdiction because of the absence of a substantial Federal question.

We think that the Act of August 24, 1937, did not contemplate that a court of three judges should be convened, or, if convened, should continue to act, *merely for the decision of a local question where no substantial Federal question is involved.* We agree with the District Court that the attempt to blend the contention as to the validity of the bond issue under State law with the question as to the authority to make the Federal grant under the Federal statutes, so as to give the former the aspect of a Federal question, is unavailing. The local question and the Federal question are distinct. See Hurn *v.* Oursler, 289 U. S. 238, 245, 246. (Italics ours.)

It is unnecessary to quote from the *Levering* case or the *Oklahoma Gas & Electric Company* case or the *Noriembega Company* case as the substance of the holding in those cases is contained in the *California Water Company Service* opinion, supra. The *Bianchi* case substantiates the the holding in the *Levering* case to the effect that *prior decisions of this Court deciding adversely the Federal questions sought to be presented will cause such questions to be unsubstantial and merely colorable.* To the same effect see *Hannis Distilling Company* v. *Baltimore*, 216 U. S. 285; *McGilora* v. *Ross*, 215 U. S. 70, and *Norton* v. *Whiteside*, 239 U. S. 144.

Thus it will be seen from the foregoing cases that where the Federal questions are *obviously without merit*, or have been clearly decided adversely *by prior decisions* of this court, such questions are without substance and do not confer jurisdiction upon the District Court to permit consideration of questions of local laws sought to be presented.

In the *Levering* case, *supra,* it was held that the substantiality of the Federal question must be determined by the allegations of the complaint and not upon the facts as they may turn out, and that if the claim pleaded is plainly unsubstantial, jurisdiction is wanting. A consideration of the Federal questions alleged in the *Levering* case resulted in a dismissal of the suit because such questions had been previously decided by this Court.

Applying the doctrine of the foregoing cases to the allegations of the complaint in the instant case, it will be seen that the Federal questions were not substantial and that the Court thereby was not warranted in proceeding to a consideration of any local questions. The claims advanced under the Federal Constitution have been exhaustively argued in appellants' original brief and it is unnecessary to do more than to refer to the same here to show that each of the claims had been already decided adversely by this Court.

The interstate commerce question had been decided in the *Eisenberg* case and the *Townsend* v. *Yeomans* case, among others cited in appellant's brief, as well as by the *Arkadelphia Milling Company* case, hereinafter cited (see *infra* pages 23-24).

The question of discrimination had been decided by this Court in the *Ten Eyck* case, the *Currin* v. *Wallace* case, and the *Rock Royal Co-Op.* case, among others cited in appellants' brief.

The due process question had been previously decided by this Court in the *Munn* case, the *O'Gorman & Young* case, the *Nebbia* case, the *Hegeman Farms* case, the *West Coast Hotel Company* case, the *Townsend* v. *Yeomans* case, and *Agnew* case, all cited in appellants' brief.

So it is submitted that the Federal questions presented had been previously determined by this Court adversely to

Appellees, and the Court had no authority to proceed to consideration of the local questions.

(c) EVEN IF THE FEDERAL QUESTIONS WERE SUBSTANTIAL, THE FEDERAL AND LOCAL GROUNDS WERE NOT IN SUPPORT OF A SINGLE CAUSE OF ACTION, BUT PRESENTED TWO SEPARATE AND DISTINCT CAUSES OF ACTION. In *Hurn* v. *Oursler*, 289 U. S. 238, this Court laid down a corollary rule respecting the right of the District Court to consider local questions as well as Federal questions. In that case it was held that even though the Federal question *was substantial*, although adversely decided, it did not *necessarily* follow that the Court had jurisdiction to proceed to the local questions. The limits within which the power could be exercised was carefully charted. Referring to the previous case of *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, this Court in the *Hurn* case said (289 U. S. text 243, 245):

> "This Court held (referring to the Siler case) that the circuit court, having acquired jurisdiction by reason of the federal questions involved, 'had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.' • • •
>
> But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action."

This Court observed that the particular questions of local law and of Federal law involved in the *Hurn* case "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances" (289 U. S. text 246).

An application of the *Hurn* case to the instant case will reveal that the Court was without jurisdiction to proceed to the local questions because the Federal and local questions presented two separate and distinct causes of action and were not merely two distinct grounds in support of a single cause of action. The *constitutional* questions were directed against the statute. The *local* questions were directed to the procedure of the Commission in promulgating the Regulation. The facts relied upon to sustain one were entirely different from the facts relied upon to sustain the other. One involved matters of substance; the other involved mere matters of procedure. It seems clear that the two claims presented distinct causes of action.

(d) THE LOCAL QUESTIONS WERE NOT SUFFICIENTLY RAISED TO ENABLE THE COURT TO CONSIDER THEM. It was alleged that the Florida Citrus Commission, when it promulgated the Regulation, did not have before it petitions signed by the required owners of producing acreage of citrus fruit in Florida (R. 11-12). Such allegation is insufficient because it merely makes denial in the general terms of the statute. It is not denied that the Commission did not have some petitions before it, and if so, the percentage of such petitions is not alleged. The averment is merely a conclusion without any facts alleged to support the contention of non-compliance. Furthermore, the allegation does not even deny that the Commission had before it petitions signed by owners of 50% or more of the producing acreage of *grapefruit* in Florida. The Resolution on its face avers such fact (R. 31) and the complaint does not dispute it. The com-

plaint merely avers that there were no petitions from 50% of the owners of producing acreage of *citrus fruit* in Florida. The Act itself permits its provisions to be applied "to any one or more of the citrus varieties embraced hereunder as may be determined by the petitions and agreements provided for in the foregoing section" (R. 20). Only grapefruit was involved in the Regulation of the Commission. Therefore, even the general averment of the complaint could be true and still strict compliance with the Act with reference to grapefruit not be denied. So this matter of local law was not sufficiently raised.

It was further alleged that the Commission did not determine the percentage of acreage on the basis of proper surveys, (R. 12). It is obvious from the Act, particularly Section 4 thereof, that whatever petitions or agreements must be presented to the Commission, before the Regulation is adopted, refer to and embrace only the particular variety of citrus fruit covered by the Regulation. This being so, the averment is insufficient because it does not confine the non use of proper surveys to grapefruit. The complaint refers to "citrus fruit". Moreover, it is not alleged *what* surveys in fact were relied upon by the Commission, and it is not denied that the Commission used *some* kind of surveys as a basis for its action. The averment is a mere denial in the very general terms of the Act. No facts are alleged sufficient to present a justiciable issue.

It is alleged that the Commission did not procure from producers or handlers not subject to the Act, proper agreements to conform to the Regulation (R. 12). This averment also is in the nature of a conclusion with no facts stated to support it. Also a copy of the Regulation is attached to the bill made a part thereof (R. 31) which contains a finding by the Commission that *all* citrus fruit dealers handling grapefruit grown in the State of Florida were subject to the provisions of the Act and the complaint does not deny

such finding. The complaint does not deny that there were *no producers, shippers or handlers* not subject to the Act. It is merely alleged that *no agreements* were procured. Certainly if there were no persons from whom such agreements should be procured, there would be no agreements procured. This allegation does not raise sufficiently a question of non-compliance by the Commission.

It was contended that the Commissioner of Agriculture had no legal authority to revoke the licenses of appellees as citrus fruit dealers because of violation of the Growers' Cost Guarantee Act (R. 15-16). This contention is not available to appellees because a copy of the Bond and License law is attached to the complaint (R. 20-31) and shows clearly that under such circumstances it was not only the right, but the express duty, of the Commissioner to revoke such licenses. This point was covered by pages 115 and 116 of appellants' brief. The Bond and License law was by reference made an express part of the complaint (R. 11), and being a part of the complaint effectually neutralized the contention made in the body of the complaint that the Commissioner lacked authority in the manner specified.

Thus the allegations of the complaint were insufficient to properly raise the local questions even if the Court otherwise had jurisdiction to proceed past the Federal questions.

5. **Interstate Commerce.** Appellees on page 44 take issue with the quotation made in appellants' brief, page 68, from *Chassaniol* v. *City of Greenwood*, 291 U. S. 584, 78 L. Ed. 1004, to the effect that "Until such time as a commodity actually commences its journey from one State to another, the State in which the commodity is located has full jurisdiction to regulate its manufacture and production". Appellees characterize the above quoted language from this Court as "patently so narrow as to be incorrect", implying

that the *Chassaniol* case has been overruled by the *Stafford* case, the *Santa Cruz Fruit Packing* case and the *Fainblatt* case.

The *Santa Cruz* and the *Fainblatt* cases may be immediately disregarded because they both arise under the National Labor Relations Act. Congress had definitely invaded the field. Also the facts in both cases show that interstate commerce was directly affected. The *Stafford* case, aside from being an earlier case than the *Chassaniol* case, is clearly distinguishable. It concerned the constitutionality of the Packers and Stockyards Act passed by Congress to regulate the business of meat packers done in interstate commerce. There five large national meat packing establishments [5] had "for more than two decades conspired together to control the meat distribution business in the country" and had in fact suppressed competition and were virtually dictating prices. The Act was passed to deal with the evil as a National problem based upon an obstruction to interstate commerce. The Act was sustained on the same theory. The gist of the holding of this Court, in the opinion by Mr. Chief Justice Taft, is as follows (258 U. S. text 516):

> "The Act, therefore, treats the various stockyards of the country as great National *public utilities* to permit the flow of commerce from the ranges and farms of the west to the consumers in the east. It assumes that they conduct a business affected by a public use *of a national character and subject to national regulation.*"

So it is that the three cases cited by appellees do not modify the principles of the *Chassaniol* case. But a closer analysis of the *Chassaniol* case will reveal that it was

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[5] Swift, Armour, Cudahy, Wilson and Morris, called the "Big Five". 258 U. S. text 499.

founded *upon facts identical with the facts in the instant case.* The City of Greenwood, Mississippi, had by ordinance levied a tax upon every person in the business of buying or selling cotton for himself within the city. The ordinance and the statutes authorizing it were challenged under the commerce clause of the Federal Constitution. We quote from the opinion of Mr. Justice Brandeis holding the Act constitutional as not affecting interstate commerce (291 U. S. text 585):

"Greenwood is a concentration point for long staple cotton and an active market for its purchase and sale. All of the cotton there dealt in is grown and ginned in Mississippi. It reaches the Greenwood warehouses, about 70 per cent by rail, the rest by automobile, truck or wagon. There, it is compressed substantially as described in Federal Compress & Warehouse Co. *v.* McLean, *ante*, p. 17. Purchases and sales are made upon the market by transfer and delivery of receipts issued by the local warehouses under the United States Warehouse Act. The prices are governed largely by transactions on the cotton exchanges of New York, Chicago, New Orleans, and Liverpool.

There are at Greenwood about 25 cotton buyers, each of whom, like Chassaniol, purchases and sells cotton for himself. The buyer becomes the absolute owner. He makes the profit or bears the loss. But when he buys he customarily has in hand and in mind orders or contracts for that particular grade, for immediate or future delivery in other States or countries to the extent of about 90 per cent, on the average, of all cotton purchased by him. • • •

Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is *destined* for ultimate shipment to some other state or country; and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is

the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in *Federal Compress Co.* v. *McLean*; and the rule there declared must govern here. *Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce.* Hence those engaged in performing any such local function may be subjected to an occupation tax, just as the property used, *or processed*, by them may be subjected to a property tax.

There is nothing in *Dahnke Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 or in *Lemke* v. *Farmer Grain Co.*, 258 U. S. 50, inconsistent with this conclusion. The regulations involved in those cases were found to impose a direct burden upon interstate commerce itself. *Stafford* v. *Wallace*, 258 U. S. 495, is also in harmony with the rule here applied. See *Minnesota* v. *Blasius*, 290 U. S. 1, 7-8." (Italics ours.)

Appellees (on page 45) attempt to distinguish the *Chassaniol* case by contending that, with the passage of the Growers' Cost Guarantee Act, the State of Florida "has attempted by statute to impose an arbitrary condition upon the sale of a product *destined* for interstate commerce". But we find from the opinion in the *Chassaniol* case that the identical argument was raised there and repudiated by the court. It was held that even though the product was "destined" for ultimate shipment to some other State or country, such fact did not necessarily cause interstate commerce to be affected or unduly burdened. The *Chassaniol* case is direct authority for Appellants' position here and Appellees have failed to distinguish it.

But if further authority were needed on the principle here contended for, we have but to cite the case of *Arka-*

delphia Mill. Co. v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 39 S. Ct. 237, decided by this Court in March, 1919, in opinion of Mr. Justice Pitney. The *Arkadelphia* case is so nearly like the case at bar and the reasoning is so *apropos* as to seemingly silence all contention that the commerce clause is violated. The State of Arkansas had fixed a transportation rate upon rough material (logs, etc.), and the railroad made the point that, since the logs were transferred to the mill for the purpose of manufacture into lumber to be shipped in interstate commerce, the stated rough material rate was void. It appeared that 95% of the lumber from the mill was shipped out of the State. The court, in holding that the lower court erred in treating the movement of the rough lumber from the woods to the milling point as interstate commerce, said (249 U. S. text 151):

> "It is not merely that there was no continuous movement from the forest to the points without the state, but that when the rough material left the woods it was not intended that it should be transported out of the state, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value. The raw material came to rest at the mill, and after the product was manufactured it remained stored there for an indefinite period—manufacture and storage occupying five months on the average—for the purpose of finding a market. Where it would eventually be sold no one knew. And the fact that previous experience indicated that 95 per cent of it must be marketed outside of the state so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. The question is too well settled by previous decisions to require discussion,"

citing a number of cases. This applies exactly to the canners who purchase grapefruit to be canned within the State and eventually sold wherever they can find a market.

The *Baldwin* v. *Seelig* case cited on page 45 by Appellees is distinguishable. In the *Baldwin* case the question was whether the New York Milk Control Act could be applied against a New York dealer who had bought milk from a creamery in Vermont, transported the same to New York, and sold in that State to customers. The court observed (294 U. S. text 519) that the Act had been previously upheld "in its application to producers doing business in New York State", but it was held the New York Act did not apply to transactions wherein the New York dealer had procured his milk from outside the State and hence in interstate commerce. The facts of the instant case, however, come within the rule of the *Nebbia* and other cases, rather than the *Baldwin* v. *Seelig* case. All the canners who brought the instant suit do business and have their canning plants in Florida (R. 1-3). The canners buy their fruit from Florida producers. The Act presumes only to cover transactions in Florida with the Florida producer. There is no case presented here where a Florida canner is buying grapefruit from an out of State producer. Thus the *Baldwin* v. *Seelig* case is wholly inapplicable.

Appellees on pages 53 *et seq.* contend that it is immaterial that Congress has not legislated on the subject covered by the instant Act for the reason that "the fixing of prices to be paid farmers and growers for their commodities which are sold throughout the United States is a matter that demands uniform regulation". Appellees rely upon the principle that even though Congress has not legislated, the States are still not free to legislate if the matter is one that demands uniform regulation throughout the country. The principle may be sound, but Appellees err in applying it to the facts here. No more universal commodity, produced and consumed, could be named than milk. Also Appellees' own complaint, as well as their own evidence, show

many different factors and conditions entering into the production of grapefruit in the various producing centers easily sufficient to eliminate the necessity for uniform regulation by Congress.

6. **Discrimination in favor of co-operative canners.** Appellees on pages 32 *et. seq.* insist that the Act discriminates against the Appellees as independent canners. The statement is repeatedly made that the Commissioner of Agriculture has construed the Act not to apply to the co-operatives. The evidence in the case directly refutes this (see pages 47 and 48, Appellants' original brief). Without repeating the argument already made in Appellants' original brief on the general question of discrimination, we may summarize briefly the answer to Appellees' contentions on the point:

(a) The Co-operatives come within the Act.

(b) If the Commissioner erroneously, but in good faith, omits to enforce the law against the Co-operatives, injunction is not the remedy and the complaint does not charge the Commissioner with bad faith.

(c) In the law exempted the Co-operatives it would not be invalid, since they constitute a separate class; so if the Commissioner fails to enforce the law against them because of an erroneous belief that they are exempt or otherwise, the Appellees, being in a separate class of independent canners, are not in position to complain. If they have any remedy at all it would be mandamus to compel enforcement as to all, rather than injunction to prevent enforcement as to any.

(d) The evidence is that the law was being enforced against all canners.

As to the proposition of Appellees on pages 78 and 79, that producers canning their own fruit are not subject to

the Act, and that the Commission did not require the producers to sign the agreements mentioned in the Act, a number of answers are apparent:

(a) Owners processing their own fruit are entirely without the scope of the Act. The Act applies only to *"agreements"* relating to sale, marketing and processing, and so long as a grower deals with his own fruit he is not affected.

(b) The grower canning his own fruit is obviously in a separate classification.

(c) The agreement which the Commission is required by Section 3 to obtain from those "not subject to the provisions of the Act" is that they will *"conform thereto and abide by its terms."* What are the "terms" referred to? The terms of the Act are that:

> "Every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm, corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production."

These are not such terms as any one person can conform to; they require a *"contract"* to bring them into operation. Subsequent language of the Act emphasizes this construction. Hence it is that the provision of the Act about obtaining an agreement is an absurdity and a nullity, and the Commission correctly found that there were no persons not subject to it.

(d) If we assume that

> "producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act"

are expected to agree that they will not buy or sell citrus fruit except in conformity with the Act it would still not preclude them from processing their fruit, and after that they sell canned goods and do not sell fruit at all.

7. **No denial of due process of law.** Appellees' argument on pages 26-27 that the Act is for the grower and against the general public is completely refuted by the preamble to the Act. The judiciary cannot convict the State legislature of false and fraudulent recitals in the preamble. Nor can the judiciary say that the facts and reasons set forth in the preamble are so manifestly non-existent as to invalidate the Act. Nor can the judiciary assume that the legislature did not give full consideration to all phases of the industry and to the interests of the public generally in the enactment of the law, at least in the absence of clear and convincing proof which does not exist here.

On page 34 Appellees deny the right of the State to take away from the owner his right to fix the sales price of his product. Many answers to this proposition suggest themselves. The Appellees here are not the owners of grapefruit, but are merely potential buyers thereof. Also, the right to fix prices for one's products is not absolute any more than the right of freedom of contract, but must yield to the paramount public interest, as declared in the many cases from this Court cited in Appellants' original brief.

Appellees attempt to take the instant case out of the rule of the *Nebbia* and other cases by contending that the citrus industry in Florida is not "a paramount or basic industry, nor one directly or materially affecting the public health, such, for instance, as the dairy industry" (page 27). But curiously enough, we find Appellees in the next breath referring to grapefruit as "a healthful food product, grapefruit" and the canned product to be "health producing fruit" (page 40). And that the citrus industry *is* "a

paramount and basic industry" is established both in fact and upon judicial authority of this Court.

Appellees (on page 30 and other pages) try to distinguish the instant Act from the New York and Virginia Milk Acts upheld by this Court, by contending that the Milk Acts were broad, comprehensive measures, regulating the entire industry affected, while the instant Act is merely an isolated price fixing act without presuming to cover all phases of the citrus industry. But appellees completely overlook the many other citrus regulatory laws of Florida in existence at the time the instant act was passed and at the time this case was filed. All of such acts taken together completely regulate every phase of the citrus business in Florida. While they are not all put into the same legislative enactment, they must all be construed *in pari materia* as constituting the general legislative program in the citrus field. It would unduly encumber this brief to present even briefly the provisions of these many State Acts. There are so many of them that each year the State Department of Agriculture, Citrus Inspection Bureau, publishes a revised book containing solely the citrus laws in force. Copies of this publication containing the citrus laws in force at the time the suit was instituted will be filed under separate cover as Appendix "B" to this reply brief, in order that this Court will have before it in the consideration of this cause all the various regulatory measures governing the citrus industry in Florida. Many of these acts were passed at the same 1935 legislative session at which the instant Act was passed. But whether at the same session or not, and whether passed before or after the instant Act, all these citrus laws must be taken and construed together as constituting the legislative program. When so construed they certainly cover all phases of the industry as completely as do the single Acts involved in the New York and Virginia Milk cases. And lastly, appellees advance no reason why, even if it stood

alone, the Grower's Cost Guarantee Act would not be valid.

Appellees again (on pages 35 and 36) make feeble effort to distinguish the instant Act from the milk laws and from the ticket broker Act involved in the *Tyson* case, by contending that in the latter cases the legislation merely fixed "maximum charges" or "maximum sales prices of milk or of other essential commodities". It is said that the Grower's Cost Guarantee Act "is not a maximum law but a minimum law and cannot be for the protection of the public or for a large number of the members of a community". In the first place, both the New York and Virginia Milk laws permitted the fixing of *minimum* as well as *maximum* prices to be paid to producers for milk. In the second place, grapefruit is within the class of an essential commodity, the same as milk, differing possibly only in degree. The legislature so found it, this Court has so declared it, and appellees elsewhere in their brief admit it.

8. **"Full hearing" before the Commission.** Appellees attempt to present to this Court an entirely new question not previously urged. It is said that the Regulation of the Citrus Commission is void because the Act authorizing it did not provide for notice or hearing, nor was any full hearing had by the Commission. It is significant that appellees are searching for points other than those relied upon in the lower court. But several answers are obvious to the proposition of "Notice and Hearing" attempted to be raised:

(a) The question is not raised in the complaint. Appellees on page 54 of their brief say their complaint charged "that the cost of production was not properly determined by the Florida Citrus Commission and that said Regulation constitutes a denial of the property rights of these appellees without due process of law (R. 13)". Even if the quoted language were an accurate appraisal of the complaint, such allegations would be too general to support a

contention that appellees were denied *notice and hearing* or that the statute failed to provide therefor. In the second place, a careful examination of the complaint itself (R. 13) shows that it is not susceptible to the reference thereto made in appellees' brief. The complaint at that point (which is the only place in the complaint relied upon by appellees as presenting the question) raises the due process proposition on the ground that the Citrus Commission adopted the cost price "as the result of experiments on certain isolated groves by certain persons who were not members of the Florida Citrus Commission and that the said price is not the actual cost of production nor an average reasonable cost per standard packed box of grapefruit throughout the State of Florida; That among other things, the said 32¢ basis includes 9.8¢, considered by the Commission to represent interest on investment by the grower" (R. 13). This says nothing about notice and hearing, either in fact or as a provision of the law. Thus the complaint wholly failed to present the question now so elaborately argued by appellees. The point was not argued before the lower court.

(b) The record does not show that a hearing was *not in fact had* and the presumption must be indulged that the proceedings were regular and whatever should have been done was done by the Citrus Commission. It is true the Court in its opinion (without sustaining evidence) found that the Commission had not *procured certain required agreements* before adopting the Regulation, but the opinion does not show that the Commission did not accord *full hearing.*

(c) Appellees were not necessarily entitled to a hearing before recordation of the cost price. If any such hearing were required at all, it would have been for the benefit of the growers. The rights of appellees as potential buyers were not involved. And even if the growers or canners, or

both groups, *were* entitled to a hearing, and if it be further assumed that the Commission denied all of them a hearing, it is doubtful, under appellees' own authority (on page 57), whether such failure on the part of the Commission would deny due process. An emergency had already been declared by the Commissioner of Agriculture with the consent of the Governor. It was the height of the grapefruit producing season. There was an urgent necessity for action. In the authority cited on page 57 by appellees it is plainly stated:

> "In courts of law, notice and hearing precede the adjudication. In many administrative proceedings a similar principle is operative. But in the latter type of proceedings, *because of the urgency of public need* or because of practical considerations of administrative efficiency or effectiveness prior notice and hearing is not always feasible. *In such cases due process is afforded if the person whose property is affected is thereafter given an opportunity to test the validity or propriety of the administrative action.*" (Italics ours.)

But after all what was the Commission to determine? All the Commission was authorized or required to do was *to determine a fact*, to wit, "the average reasonable cost per standard packed box of producing citrus fruit" (R. 19-20). There was no trial between parties, there was no controversy between different groups in the industry. No judgment was to be entered, or even sought, against the canners. Only a simple fact was to be determined, and certainly the canner was not a necessary party to the determination of that fact. It was in the nature of a *proceeding in rem*. See *American Land Co.* v. *Zeiss*, 219 U. S. 47, 31 S. Ct. 200; *Leigh* v. *Green*, 193 U. S. 79, 24 S. Ct. 390; and *Grannis* v. *Ordean*, 234 U. S. 385, 34 S. Ct. 779. If any parties at all were necessary, it was merely the grower group. The independent canners did not produce the fruit, therefore they could hardly throw any light on the cost of

production. We have again the canners virtually contending before this Court that the Act and Regulation are invalid because some right of the growers has been violated.

(d) It does not appear from the record that appellees *did not know* that the Citrus Commission had the question under investigation, or that they did not have opportunity to be heard, or that they were not in fact heard in the fixing of the cost price. In the absence of such showing this Court must assume that appellees did actually have notice. And if they had notice, the question is brought directly within the authority of *Detroit, Ft. Wayne & Belle Isle Railway* v. *Osborn*, 189 U. S. 383, 23 S. Ct. 540, 47 L. Ed. 860. In that case the legality of an order of the Commissioner of Railroads of the State of Michigan was challenged. We quote from the opinion of Mr. Justice McKenna (189 U. S. text 390):

> "The objection that the statute does not provide for notice seems to be made for the first time in this court. It is not mentioned in the majority opinion nor in the dissenting opinion. It is not particularized in the petition for the writ of error nor in the assignment of errors. In the petition for this writ of error it is recited that the plaintiff in error in its application for mandamus claimed that the order of the railroad commissioners was invalid because it deprived plaintiff in error of its property without due process of law and denied it the equal protection of the laws. And also recited that on the 'issue framed therein said cause went to a final hearing.' The cause was submitted on petition and answer, and the petition alleged 'that notice was given by respondent to relator and the Union Terminal Association, and the hearing had, at which relator's representative objected to the making of said order.' It is therefore not open to the plaintiff in error to complain that the statute does not provide for notice."

(e) If the right existed on behalf of the canners they have waived it in this proceeding. If appellees did not in fact receive notice, they are not in position to complain. So far as the record shows they made *no request for hearing.* They took no issue with the Commission *after* the order was entered. They made *no protest* that they had been denied hearing. They made *no application for rehearing or reconsideration of the order.* In fact, they waited over two months after the Regulation went into effect before they filed their complaint in court and even then did not complain of lack of notice of hearing. During all this time appellees fully acquiesced in the order so far as the record shows. In this connection see the "*Second Morgan* case," cited and relied upon by appellees in their brief, pages 71-73.

(f) Even if the statute does not specifically provide for notice and hearing, such provision may be, by implication, read into the statute and the Act rescued from invalidity upon that ground. This was the precise holding in *Boeing Air Transport* v. *Farley,* 75 F. (2d) 765, relied upon by appellees in pages 70 and 71.

In *Buttfield* v. *Strahanan,* 192 U. S. 470, 24 S. Ct. 349, a Federal Act permitting the establishment of government standards of purity, quality and fitness for consumption of imported tea without notice to the importer thereof and even allowing his tea to be refused admission into the United States because inferior to such standards, was upheld as not denying due process of law. See also *United States* v. *Heinszen,* 206 U. S. 370, 27 S. Ct. 742.

Municipal ordinances fixing telephone rates have been held by this Court not to deny due process of law even though the municipal charter under which enacted did not expressly provide for notice of hearing, where both notice and an opportunity to be heard were in fact accorded.

Home Telephone & Telegraph Co. v. *Los Angeles*, 211 U. S. 265, 29 S. Ct. 50.

In *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 53 S. Ct. 522, it was held that due process was not denied even if the entry of judgment preceded the opportunity to present a defense.

And in *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, it was held that due process does not require that opportunity be given before the entry of judgment to present a defense, but it is enough that it may be presented on appeal from the judgment.

The New York Milk Control Act upheld in the *Nebbia* case, 291 U. S. footnote page 519, permitted the State Board to

> "ascertain by such investigations and proofs *as the emergency permits*, what prices for milk in the several localities and markets of the State, and under varying conditions, will best protect the milk industry in the State and insure a sufficient quantity of pure and wholesome milk * * *."

(g) The argument made and cases cited by appellees beginning on page 59 with respect to the meaning of the word "determined" is fully answered by the fact that there is nothing uncertain in the price fixed by the Commission. It was a definite, set, fixed price, to-wit, 32¢ per standard packed box (R. 31-32). Likewise, the cases cited on page 60 holding that certain determinations made by State boards must be "declared in such a way that it may be known" is answered by the Regulation itself, which appellees affirmatively allege was passed by the Florida Citrus Commission on January 16, 1939 (R. 11).

(h) Appellees (on page 78) are wholly unjustified in accusing the Commission of refusing to accord a full hearing because "it was too much trouble and would take too

much time to comply with the Act." Where appellees get their facts to support such charge is not clear from the record. In the first place, the eleven members of the Citrus Commission are themselves experts in the citrus producing field. Under the provisions of the Act creating the Commission they must all be "practical citrus fruit men". They must all be growers of citrus fruit. They probably are in better position and are better qualified themselves from their own knowledge and experience to arrive at a cost price than any one else.

But the evidence in the record shows that the Commission was *unusually deliberate and painstaking* in the performance of its duty. The Chairman of the Commission says that as early as January 6, 1939 the Commission began its investigations (R. 41). He further says that on January 16, "after considering all the information available relating to the cost of production of grapefruit, which information included compilations of data supplied by the Chief Field Agent for the Commission, and the Agricultural Extension Service of the University of Florida, the Commission found, * * *" etc. (R. 42). The Chief Field Agent of the Commission stated that he gathered and compiled information from growers and shippers of grapefruit in Florida, used information available from various sources and consulted with and obtained information from the Department of Agricultural Economist, of the Agricultural Extension Service, University of Florida, at Gainesville, Florida, all of which was presented to the Commisison (R. 43). The Agricultural Extension Economist of the State University, who had studied extensively over a period of years the cost of producing grapefruit in Florida and had published bulletins and articles on the subject, made available to the Commission all information and data collected by his Extension Service (R. 44).

9. **Right of Commissioner to revoke licenses.** Appellees on pages 82 and 83 insist that the Commissioner of Agriculture "is without authority to revoke the licenses of Appellees because of their failure to comply with the Grower's Cost Guarantee Law". The provisions of the statutes were pointed out to this Court in Appellants' original brief on pages 115 and 116. It was shown that under the Bond and License law, it was not only the Commissioner's *right* to revoke the licenses, but it was his positive *duty* so to do, if appellees, as citrus fruit dealers, violated the provisions of the cost price law. But appellees advance the unique contention that a violation of the cost price law does not come within the Bond and License law because the former was enacted by the legislature after the latter, although at the same session of 1935. Such contention is so untenable that it betrays a significant desperation on the part of appellees. The Bond and License law uses the language "any of the provisions of any other law of the State of Florida governing and applicable to citrus fruit dealers" (R. 27). This provision was without limitation. In fact, to have confined it to prior citrus laws would have been to create grave doubts as to constitutionality of the law. In the second place, even if appellees' far-fetched argument were sound, it would have to fall because of the fact that the 1937 legislature reenacted the Bond and License Act, and the 1937 law was in effect at the time this suit was instituted. Appellees even show this on the face of their own complaint. (R. 20). Further argument is superfluous.

Likewise without merit is the argument of appellees on page 83 that the cost price law "provides no penalties whatsoever for violations thereof, but merely creates a liability on the purchaser of citrus fruit * * *." While not material to this case, the Act denounces as unlawful "any contract, plan, scheme or device", attempting to preclude the grower from receiving his cost price, and also requires

any person "buying, marketing or processing" citrus fruit from the grower to pay the grower his cost of production (R. 20). Failure on the part of any processor to obey such terms of the statute would clearly constitute a violation of law on the part of such processor. The mere fact that no specific criminal penalties or punishment is provided in the Act does not at all relieve the transgressing dealer from criminal prosecution. The statutes of Florida expressly provide for punishment in cases of criminal violation where specific punishment is not set forth in the Act denouncing the offense. Section 7104, Compiled General Laws of Florida, 1927.

10. **Interlocutory injunction should not have been granted.** Appellees on pages 14 *et seq.* contend that the interlocutory injunction, in effect, was merely a routine order in the case to preserve the *status quo* of the subject matter until final hearing and that the Court did not intend or presume to pass upon merits of the case. But Appellees can not get away from the plain showing of the record. While Appellees say that "in substance, the Court said that it appeared to it that the Appellees would suffer irreparable damage unless the injunction was issued, and the court, therefore, concluded that the injunction should be granted", in the very next breath Appellees admit that "when the opinion was later filed, it consisted of findings of fact and conclusions of law * * *" (page 15). It is admitted on page 15 that the opinion *gave the reasons of the Court* for the granting of the interlocutory injunction. And the Court in its opinion mentioned nothing about irreparable damage or any of the other matters which should properly have been considered on interlocutory application. The opinion concerns itself only with the ultimate merits of the case. And if such matters constituted the easons for the issuance of the interlocutory order, it cannot be success-

fully urged that the Court was moved by any other consideration. The order must stand or fall upon the reasons which the Court assigned for its issuance. It must be assumed that if the Court was actuated by other considerations than the merits of the case, it would not have gone to the trouble to specifically set forth what the reasons were.

11. **The opinion.** It is suggested by Appellees that the Court was not bound by its conclusions on the validity of the law. It is said that the Court might have changed its mind by the time of final hearing. Appellees on page 16 say that "if Appellants have any testimony that would show a different state of facts, they have ample opportunity to present the same". A sufficient answer to this statement is that the Court did not even wait for all the testimony upon interlocutory application to be put in before finding facts and declaring the Act unconstitutional. See page 38, Appellants' original brief. Appellees concede on page 15 that the opinion of the Court contained "findings of fact and conclusions of law" and even Appellees do not contend in their brief that such facts were found solely in connection with the motion for interlocutory injunction. It is too obvious for comment that such facts were found upon the merits of the case and were so applied.

Appellees are at a loss to explain why the Court wrote its opinion finding facts and declaring the law unconstitutional before even the facts were all in. Appellees frankly say (on page 23) that they "do not know what happened" but they "surmise" that the Court wrote its opinion and merely held it until after all the motion evidence was in. Appellees refer to such procedure mildy as "an irregularity". But why the Court would even presume to write its opinion finding the facts and declaring the State Act unconstitutional, before all the facts were in, is not explained. An adjudication of fact is supposed to be a very deliberate

matter involving the exercise of judgment and a careful weighing of all the evidence. The striking down of a State law by the Federal Court is supposed to be a very serious undertaking. Some of the criticism which Appellees mistakenly direct to the Commission with reference to not taking "much time" to sufficiently perform its duties might with more propriety be urged to the writing of the opinion by the Court, if we accept the Appellees' "surmised" version of how it happened.

12. **The evidence.** Appellees on page 23 refer to the language "unusual, undignified and cumbersome" used by appellants in their original brief, but appellees use the phrase in an entirely different manner than used by appellants. Appellants characterized, with the quoted language, the action of the Court in permitting oral testimony at the interlocutory hearing. Appellees mistakenly claim that it was used to characterize *what the evidence showed.*

Appellees make no attempt to answer the argument made in appellees' brief, pages 41 to 49, that the facts found by the Court lacked support in the evidence. At the risk of being harsh, appellants would suggest that the paucity of argument on the point is brought about solely by the range of possibility permitted. One reference in appellees' brief, page 22, to the evidence in the case we particularly desire to point out to the Court. Appellees say that "Mr. Polk shows clearly that it was impossible for any canning plant to tell what profit it had made until the season had been completed, and the finished product sold and disposed of" (R. 73). Thus appellees, by their own construction of their evidence, effectually put out of the case all the argument about the appellees having to close their plants because of "tremendous losses". It would seem also that such fact would destroy appellees' contention that the Court issued the interlocutory order to save the canners "irreparable loss". Why would the canners have to close up because of

serious loss if they would not know until the end of the season whether they would in fact sustain any loss? Secondly, the very fact that they would have to wait until the end of the season, as stated by Mr. Polk and conceded by appellees in their brief, presupposes the fact *that the canners would remain open.*

Conclusion.

We again apologize for the length of appellants' original and reply briefs. The task of keeping the record straight, the lower Court straight, appellees straight, and possibly ourselves straight, has compelled the unravelling of many tangled skeins, which otherwise might have been unnecessary. Appellants trust that from the confusion this Court may add a valuable precedent to the nation's jurisprudence by holding valid the Act under attack and thereby also going a long way toward permitting the States to remedy much of the agricultural ills of this country.

Respectfully submitted,

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APPENDIX "A"

Grower's Cost Guarantee Law, Chapter No. 16862, Laws of Florida, Acts of 1935.

An Act relating to citrus fruit: Prescribing conditions and limitations upon the sale, marketing and processing thereof, and the effect of contracts of sale and of marketing and processing agreements.

Whereas, it is found by the Legislature and hereby declared that the production and distribution of citrus fruit is a paramount industry in Florida upon which the prosperity of the State in a large measure depends; that such fruit and the juices thereof have become and are generally used in great and rapidly increasing quantities, both voluntarily and upon advice of physicians, by people of all classes, ages and conditions; that it is necessary for the reasonable comfort, welfare, and health of the people and in order to build up their strength and vigor that an adequate and dependable supply of high grade citrus fruit be constantly available, and the production, transportation, processing, distribution and sale of citrus fruit in the State of Florida is therefor hereby declared to be a business affecting the public health and interest, that unfair, unjust, destructive, demoralizing, and uneconomic trade practices have been and are continuing to be carried on in the sale and distribution of citrus fruit in this State to the extent that such fruit has been and is continuing to sell in many cases at prices below the cost of production and the constant, dependable and adequate supply of such fruit for sale and consumption is thereby so seriously imperiled as to threaten the break down of the industry; that the present acute economic condition in Florida is in part the consequence of a severe and increasing disparity between the prices of citrus fruit and other commodities; that it is both expedient and necessary to build up the quality and reputation of Florida's citrus fruit in the market and to stabilize the Florida citrus industry and to protect the public and the growers against fraud, deception, and financial loss through further continuation of unscrupulous practices and haphazard methods in con-

nection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

Therefore, in the exercise of the police power of the State, for the purpose of protecting and promoting the public health and general welfare, Be It Enacted by the Legislature of the State of Florida:

Section 1. This Act shall be known and called the Growers Cost Guarantee Act.

Section 2. The term "Citrus Fruit" as used herein means and includes only the fruits Citrus Grandis, Osbeck, commonly called grapefruit, and Citrus Sinensis, Osbeck, commonly called oranges, and Citrus Nobilis Deliciosa, commonly called tangerines, grown in the State of Florida.

The term "standard packed box" means 1⅗ bushels whether in bulk or in a container.

Section 3. The Commissioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitions signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time to time may make, and after the Citrus Commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the average reasonable cost per standard packed box of producing citrus fruit and every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm, corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost

of production, to be ascertained by multiplying the said cost per standard packed box as shown by the record of the Commission current at the time the contract, agreement, plan or arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

Section 4. The provision of this Act shall apply to any one or more of the citrus varieties embraced hereunder as may be determined by the petitions and agreements provided for in the foregoing section.

Section 5. This Act shall become effective immediately upon becoming a law.

Approved June 8, 1935.
Filed in Office Secretary of State June 8, 1935.

(5577)

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 270

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

LAKELAND HIGHLANDS CANNING CO., INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL.

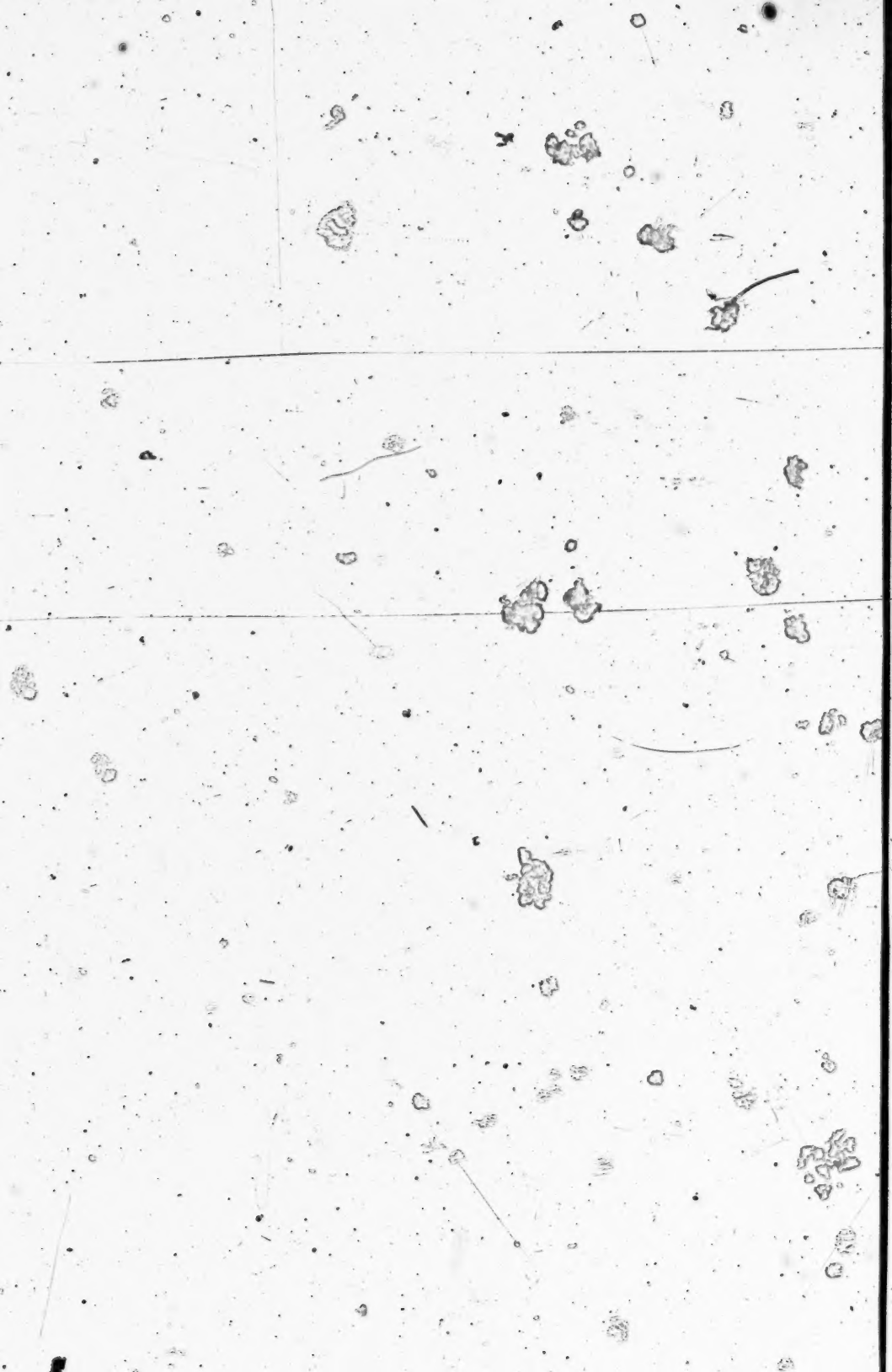
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

STATEMENT OPPOSING JURISDICTION.

John B. Sutton

G. L. REEVES,
Counsel for Appellees.

SUTTON & REEVES,
Of Counsel.



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IN THE

DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION

LAKELAND HIGHLANDS CANNING CO., INC., A CORPORATION; THE POLK COMPANY, A CORPORATION; ROBERTS BROTHERS, INC., A CORPORATION; FLORIDA GRAPEFRUIT CANNING CO., A CORPORATION; D. J. APTE AND R. E. APTE, DOING BUSINESS AS APTE BROTHERS CANNING CO., FLORIDA GOLD CITRUS CORPORATION, A CORPORATION; BORDO PRODUCTS COMPANY, A CORPORATION; HILLS BROTHERS CO. OF FLORIDA, A CORPORATION; BRUCE'S JUICES, INC., A CORPORATION; ECKERSON FRUIT CANNERS, INC., A CORPORATION; SUNDINE COMPANY, A CORPORATION,

Plaintiffs,

vs.

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA,

Defendant.

FLORIDA CITRUS COMMISSION, A BODY CORPORATE,

Intervening Defendant.

STATEMENT BY APPELLEES AGAINST JURISDICTION OF THE SUPREME COURT.

Appellees understand that the statement as to jurisdiction is solely for the purpose of showing to the Supreme

Court of the United States that the Court has jurisdiction of the appeal.

However, Appellants devote the major portion of their statement as to jurisdiction to a legal argument as to the constitutionality of the statute under attack. We do not consider this the proper place or time to burden this Court with a brief on that question. If the Court takes jurisdiction, then the merits of the question involved can properly be presented in briefs and not in this statement as to jurisdiction.

In the last few years, this Court, as well as many State courts, has been presented with many regulatory and price fixing laws.

However, suffice it to say that counsel for appellees have been unable to find any case either in the Supreme Court or any other court of record where the price was fixed upon a similar basis as that in the statute under attack in this case. The price under the Growers Cost Guarantee Law of Florida is based solely and entirely upon the cost of production of the product; and the interest of the public is not taken into consideration at all. If this law is held constitutional, then we may reasonably expect many, if not all, of the States to pass production cost laws for all products. Needless to say, the chaotic condition which would arise from such laws would be worse in this country than any panic or depression.

Inasmuch as appellants have made a major portion of their statement as to jurisdiction into a lengthy brief on the constitutionality of the statute which, as stated above, we do not understand is necessary or proper to answer at this time, there is very little left in the statement concerning the jurisdiction of the Supreme Court; therefore, no need for a lengthy statement on the part of the appellees.

Appellants criticize the District Court for rendering an

opinion on the constitutionality of the statute upon application for preliminary injunction. Appellants asked for an opinion and urged the court to determine the constitutionality of the case at that time, advising the court that although no answer or other pleadings had been filed by appellants, they were prepared to introduce evidence and requested an immediate decision on the constitutionality of the Act.

A point is made that no findings of fact or conclusions of law were entered or filed. A reading of the opinion of the three-judge court will readily show that it is a substantial compliance with the rule. This is all that is necessary. See *Sparks* v. *Mellwood Dairy*, 74 F. (2d) 695. *National Reserve Insurance Co.* v. *Scudder*, 71 F. (2d) 884. *Lewys* v. *O'Neill*, 49 F. (2d) 603. *Plant Products Company* v. *Chas. H. Chemical Co.*, 16 Fed. Supp. 553. *U. S.* v. *McIntosh*, 3 Fed. Supp. 715, cert. den. 55 S. Ct. 101, 293 U. S. 586.

The opinion is replete with findings of fact which, under authority of the Supreme Court, is binding upon that Court unless it be shown that such findings were erroneously entered. No such contention is made in the statement of the appellants.

Appellants contend that all testimony was not before the court at the time the opinion was rendered because the opinion is dated April 13 and some affidavits were not filed until April 15. This is immaterial and has no bearing upon the jurisdiction of the Supreme Court. As a matter of fact, the record shows that the opinion was not published nor filed until May 3, long after all affidavits and evidence was before the court.

It is urged by appellants that the opinion of the trial court was influenced by evidentiary considerations, thereby violating the rule laid down in the case of *Polk* v. *Glover*,

— U. S. —, 83 L. Ed. 73, 59 S. Ct. —; as well as the case of *Borden Farm Products* v. *Blaisdell*, 293 U. S. 194, 79 L. Ed. 281.

A moment's consideration shows the fallacy of this contention. In the *Polk Company* and *Borden* cases, the Court was ruling upon a motion to dismiss the complaint, entering *final decree on pleadings*. In the instant case, it was ruling upon application for interlocutory injunction and also an urgent request of defendant that the constitutionality of the Act be determined.

It is stated by Appellants that no findings or adjudication was made by the court as to the requisite jurisdictional amount of $3,000.00 and that the evidence fails to sustain the existence of the requisite amount. The law on this question has been very definitely settled in the case of *KVOS, Inc.*, v. *Associated Press*, 299 U. S. 269, 81 L. Ed. 183, first headnote is as follows:

> "That the requisite jurisdictional amount is involved in an injunction suit in a Federal District Court sufficiently appears from a general statement in the complaint that the damage to which the complaint is being subjected is in excess of $3,000.00 and that the amount involved is in excess of that sum, unless the bill contains other allegations which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint."

In *Gibbs* v. *Buck*, — U. S. —, 83 L. Ed. 688, 59 Sup. Ct. 725:

> "A general allegation in a bill in equity in a Federal Court that the value of the matter in dispute exceeds the necessary jurisdictional amount is sufficient, when not traversed, to show Federal jurisdiction, unless the bill contains other allegations which so detract from such general allegation that the Court must dismiss the bill sua sponte or on the defendant's motion."

It is respectfully submitted that the sworn allegations of the complaint show not only by general allegations, which are sufficient when not challenged, but also by averments of details showing that the amount involved in the controversy is far in excess of $3,000.00 as to each of the plaintiffs. This Court has held that if jurisdictional amount is shown as to one or more plaintiffs, the case should not be dismissed but only those plaintiffs dismissed who do not have the necessary amount involved. See *Grosjean* v. *American Press Co.*, 80 L. Ed. 661, 297 U. S. 233.

Not only did Appellants, as defendants in the lower Court, fail to raise any question as to the jurisdictional amount but admitted the same affirmatively by coming in the Court and requesting the Court to take jurisdiction and decide the constitutionality of the statute involved. The jurisdictional amount has never been challenged and the plaintiffs have not been required to prove the allegations. However, the evidence does substantiate that the requisite jurisdictional amount is involved.

It is sincerely urged that in passing upon the question of jurisdiction of the appeal only, the Court does not predetermine the merits of the case and the legal brief included in Appellant's statement as to jurisdiction is improper and has no place before the Court at this time.

SUTTON & REEVES,
By G. L. REEVES.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 270.

NATHAN MAYO, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, ET AL., APPELLANTS,

VS.

LAKELAND HIGHLANDS CANNING COMPANY, INC., THE POLK COMPANY AND ROBERTS BROTHERS, INC., ET AL., APPELLEES.

APPELLEES' BRIEF.

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BRIEF OF APPELLEES.

A. PRELIMINARY STATEMENT.

The statute attacked is known as the Growers Cost Guarantee Law of Florida, relative portions of the same, appearing in the opinion of the three-judge court, from which appeal is taken in this cause and, for the convenience of the court, copy of said opinion is attached hereto in the appendix. A copy of the resolution attacked likewise appears in the appendix.

Unless otherwise noted all italics in this brief are supplied.

B. STATEMENT OF THE CASE.

Appellants' statements of the case and of the statutes and regulations involved are substantially correct and any disagreement we may have with counsel as to the record will be pointed out during the argument in this brief.

C. SUMMARY OF ARGUMENT.

Because of lack of time, appellees were unable to await a copy of the brief from the appellants and, therefore, argument will not be handled in this brief identically with the manner in which appellants have handled theirs, although the same points are covered.

Since appellants in their brief for the first time raise any question whatsoever as to jurisdiction, this point will be treated first.

D. DID THE THREE-JUDGE COURT HAVE JURISDICTION TO GRANT THE TEMPORARY INJUNCTION IN THIS CASE?

This suit was instituted under the provisions of 28 U. S. C. A. 380 and at no time in the proceedings was the jurisdiction challenged by appellants. As a matter of fact, at the hearing on application for preliminary injunction, the appellants urged the court to take jurisdiction and pass upon the constitutionality of the statute involved (R. 76, opinion).

The following elements of jurisdiction affirmatively appear in this case:

(1) The amount involved is in excess of $3,000.00 as to each plaintiff.

(2) A serious federal question is involved.

(3) Necessity for equitable relief.

(1) The Jurisdictional Amount Clearly Appears.

The sworn complaint alleges facts showing that each appellee will suffer damages far in excess of $3,000.00 if the relief prayed for is not granted. When these allegations are contained in a sworn complaint and not challenged by the defendant, there is no duty upon the plaintiff to prove the same, unless, the court of its own motion raises the question.

In *Kvos, Inc.,* v. *Associated Press,* 299 U. S. 269, 81 L. Ed. 183, this court in referring to general allegations in the complaint that there was involved in excess of $3,000.00 said "such a formal allegation is sufficient, unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the fact of the complaint, in which case the suit should be dismissed by the court *sua sponte* or upon the defendant's motion." Also see *Gibbs* v. *Buck,* 83 L. Ed. 506, 307 U. S. 66.

It has been frequently held that there is no necessity of proof that the requisite jurisdictional amount is involved, where the necessary amount has been alleged, and there is no plea to the jurisdiction challenging the allegation. See *Lang* v. *Fort,* 76 F. (2d) 27; *So. Dakota C. R. Co.* v. *Chicago, M. & St. P. R. Co.,* 141 Fed. 578.

In *Kroger Grocery & Baking Co.* v. *Lutz, Jr.,* 299 U. S. 300, 81 L. Ed. 251, this court said:

> "In determining whether the requisite jurisdictional amount is in controversy where it does not appear that the complainant is deprived of its license or is prevented by the regulation from prosecuting its business, the question is not the value or net worth of the business but the value of the right to be free from the regulation, and this may be measured by the loss, if any, that would follow the enforcement of the rule prescribed." Also see *Gibbs* v. *Buck, supra.*

The question was very thoroughly discussed by Mr. Chief Justice Hughes in *Paul V. McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 80 L. Ed. 1135, in which case the issue of jurisdictional amount was raised by an answer. In that case it was said:

> "The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed * * * They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve."

In our case, as will be pointed out hereafter, the complaint alleges facts showing that the curtailment of the business of the appellees and the consequent loss, if the statute is enforced, would far exceed the sum of $3,000.00 to each of the appellees and the proof amply supports these allegations.

The complaint shows that each of the appellees is engaged in the canning of citrus products produced and grown in the State of Florida; that for the past several years, the canning industry has grown very rapidly and that during the 1937-1938 season, there were canned approximately seven million cases of grapefruit, grapefruit juice and combination juices; that the industry is an important and valuable outlet for citrus fruit, for grapefruit particularly, and that the canning industry has been utilizing from twenty-five to forty per cent of all grapefruit grown in the State of Florida (R. 3-4). The complaint then shows the average annual pack of each of the appellees, alleges that the appellees represent in excess of sixty per cent of the canning industry in volume; that the 1938-1939 season was estimated to be the largest season in the history of the state but, because of the state statute and the regulation attacked herein, up until the time of filing of the complaint there were approximately two million (2,000,000) cases less canned as

compared with the same period during the season of 1936-1937, which was the largest season up until the 1938-1939 season; that the appellees were all canning unusually large volumes up until the statute and regulation went into effect (R. 4); that large volumes of grapefruit were being offered by the growers to the appellees, at prices below the price set by the citrus commission under the act and that, except for the fixed price under the statute and regulation, the appellees could have continued to purchase and can said fruit and each would have made profits far in excess of $3,000.00 (R. 5); that many canning plants in Florida are owned by growers or by co-operative associations, consisting of individual growers; that the commissioner of agriculture has construed the statute *not* to apply to such canners; that the said grower-owned and co-operative canning plants were purchasing their supplies of grapefruit at prices far less than the fixed price of 32 cents and were, therefore, able to offer the canned product at a price so low that the appellees could not pay the growers the 32 cents per box and compete with the co-operative and grower-owned canneries and that, therefore, appellees would suffer damages far in excess of $3,000.00, if the statute was enforced (R. 5).

The complaint further shows that in excess of ninety-nine per cent of all canned grapefruit products canned by the appellees are canned solely for and go into interstate commerce and is sold throughout the United States and foreign countries (R. 5 and 6), that the canned citrus products consumed in the State of Florida are negligible (R. 6), that the canning season opens about the first of November, usually runs for a period of six or seven months and that the appellees in preparing for the canning season were forced to order their supplies, including cans, labels, and other material, and it was necessary that they make contracts for the purchase of part of their fruit requirements, that they secure labor and plan their factory operations, also properly finance

their pack and secure sales orders for part of their finished products; that the enforcement of the statute and regulation would make it impossible for the appellees to so conduct their business, and that each of them would suffer damages far in excess of $3,000.00 (R. 6); that other citrus-producing areas in other states or possessions were not affected by the Growers Cost Guarantee Law and that the strong competition from these other producing areas, where the fruit could be purchased at its market value at that time 12 cents to 20 cents per box rather than at an inflated price, would cause each of the appellees irreparable damage far in excess of $3,000.00 (R. 7).

The complaint shows that each of the appellees has invested in canning factories, stations and equipment in excess of $100,000.00; the total investment of the appellees exceeding the sum of $2,000,000.00 and that the appellees daily employ approximately 5,000 persons and their pay roll amounts to approximately $100,000.00 per week, and that the enforcement of the act and regulation would have serious effect on the value of their investments and each of the appellees would suffer damages far in excess of $3,000.00 (R. 8).

Although the canning of citrus is seasonal, the complaint further shows that when the plants of the appellees are not in operation, it is still necessary to maintain the same and keep on the pay roll many employees and that the appellees suffer large expenses and costs in overhead expenses, salaries; administrative expenses, factory personnel, power and taxes; while not in actual operations; that enforcement of the statute and regulation would make it impossible for appellees to operate their plants and, by reason of the foregoing fact, each of them would suffer loss and damages far in excess of $3,000.00 (R. 9); that each of the appellees would suffer loss in excess of $400.00 per week in pay roll alone while not operating and that if the act and regulation are en-

forced, they will be unable to operate during the remainder of the season and each of the appellees would suffer loss in pay rolls along in excess of $4,500.00 (R. 9).

It is further shown in the complaint that the appellees have, over a period of years, built up a good will for their several labels and products, throughout the United States and foreign countries; that the enforcement of the statute and regulation would cause the appellees to shut down their operations and their good will would be lost and other competing products would take the place of their canned citrus (R. 9); that each appellee would suffer irreparable damage and loss to its trade, good will, and trademarks far in excess of $3,000.00 (R. 10); that the appellant commissioner of agriculture was threatening to revoke the licenses of each of the appellees if they did not comply with said statute and regulation and that the revocation of their licenses would cause irreparable damage to each of the appellees far in excess of $3,000.00 (R. 10).

The foregoing allegations of fact contained in the sworn complaint were substantiated at the hearing by the testimony of C. E. Lindsey (R. pp. 50-63), Fred G. Elder (R. pp. 63-67) as well as the affidavit of Ralph Polk, Sr., president of The Polk Company (R. pp. 72-74) and the affidavit of John A. Snively (R. p. 71).

As further specific allegations of the amount involved, as to each appellee, complaint alleges ~~that~~ and the proof shows that one of the appellees, prior to the promulgation of the regulation, had entered into binding contracts with growers of grapefruit to purchase approximately 60,000 field boxes at a price less than 32 cents per field box and that said appellee had, likewise, contracts of sale to sell the finished product at a price that would have netted the said appellee a profit far ~~less~~ in excess of $3,000.00 (R. 16-64).

Appellants in their brief, for the first time, attempt to raise the question as to whether jurisdictional amount

appears. There was no challenge of this in the lower court. In an effort to sustain their contentions that jurisdictional amount did not appear, they picked from the testimony of the two witnesses certain isolated statements which, considered apart from the rest of the testimony, might not be clear to this court and we, therefore, urge this court to carefully read the entire testimony.

As an example, appellants refer to a portion in the testimony of Mr. Lindsey wherein he stated he had orders somewhere between one hundred thousand (100,000) and two hundred thousand (200,000) cases of canned grapefruit at a contract price which would have caused the company to suffer loss in excess of three thousand dollars ($3,000.00), if he had been required to pay the grower 32 cents a box on the tree for the raw product and he later stated that upon request his company had been relieved of the obligation under the contract, that since the temporary restraining order had been enforced, his company had gained back most of those customers. It is very clear from the testimony of this plaintiff, with orders for between one hundred thousand and two hundred thousand cases of grapefruit that when the act went into effect he had but two courses open; one, to attempt to get out of the contracts or (2) fulfill them and comply with the law which would have caused losses far in excess of $3,000.00. Fortunately, this particular plaintiff was able to get relieved from these contracts. His profits on these contracts would have far exceeded three thousand dollars ($3,000.00) but as a direct result of this statute, he was unable to carry out his contracts and, therefore, was unable to make his profits which would have exceeded three thousand dollars ($3,000.00) (R. 53).

Mr. Lindsey further stated that under the market conditions and confronted with the competition of those who were not subject to the act, his company could not

operate and that when it was not in operation, he had a dead expense of at least five hundred dollars ($500.00) a week, which item alone would run three thousand to four thousand dollars through the season.

As another example, appellants pick out a portion of the testimony of witness, Fred Elder, wherein he admits that in a desperate effort to keep his plant operating, he had submitted to the commissioner of agriculture, for his approval, a contract which would provide for an immediate cash payment of 20 cents on the box to the grower and another twelve cents on January 15th, if the law was enforced at that time. But appellants failed to show to the court that the witness had another condition in the contract and that was that the additional twelve cents would be paid if all the growers continued to get 32 cents throughout the season (R. 65). In other words, if the market price held it up to that basis through the season, then he would see that his growers received that amount (R. 65). This was almost the same setup as with the co-operatives to which the act was not applied (R. 71, 73).

Appellants make much about the statement of Mr. Elder that the purchasers under their contracts for the finished product had agreed to advance their contract price so that he could pay 32 cents per box under the conditions above set forth but appellants lose sight entirely of the fact that the witness stated definitely that, except for the statute, he could have carried out his contracts and made profits far in excess of three thousand dollars ($3,000.00) (R. 64).

This testimony was only by two of the canner plaintiffs. The sworn complaint alleges that while the appellees are not in actual operation, they have one item of expense alone that runs approximately four hundred dollars a week; that is, pay roll for the employees that they must keep on so as to be ready to operate at a later date and that, if the act is enforced against them,

they will be compelled to cease all operations and each would suffer damages in excess of forty-five hundred dollars ($4500.00) during the one season on the one item of pay roll.

This court has said:

> "The value of that right (referring to the right to do business) may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 80 L. Ed. 1135.

(2) Grave Federal Questions Were Presented.

There is involved in this suit very serious federal questions—the question whether the state statute and regulation attacked (a) violates the Fourteenth Amendment to the Constitution of the United States by depriving the appellees of their property without due process of law and by denying to the appellees the equal protection of the law; and (b) places an undue burden on interstate commerce in violation of Article I, Section VIII, of the Constitution. To put the proposition in other words, the question involved is whether a state has the power to enact a law providing that the farmers of that state shall and must be paid the cost of production of the agricultural commodities grown in that state; when said price-fixing law fails to take into consideration the interest of the public, when the price fixing is based solely, entirely and exclusively on the alleged cost of production, failing to take into consideration the value of the product to the public or its comparative value with other commodities or the ability of the public to pay such a price or any other conditions whatsoever; said statute providing for the fixing of the price by a board without any right of hearing or appeal therefrom; and said statute failing to attempt to regulate the industry in any manner or form whatsoever.

Another very serious constitutional objection to the statute which raises a federal question is the fact that the provisions of the statute may be invoked at any time capriciously, without any warning, and at the will of small groups making it impossible for the appellees to orderly carry on their businesses and to foresee what contracts made by them would be impaired or not impaired by the statute and does not except then existing contracts.

The question involved is indeed a grave question, and if the State of Florida can fix the sales price by the grower or farmer at his cost of production, then it naturally follows that every state in the Union can and should protect its growers and farmers in a similar manner which would create economic chaos throughout the United States.

(3) The Complaint Shows Grounds for Equitable Jurisdiction.

The foregoing statements of fact clearly show the need for equitable relief by the appellees. It cannot be urged that the appellees have any full, adequate and complete relief at law. They must look to equity.

As alleged in the complaint, the canning season in Florida begins about the first of November each year, reaches volume production in some two weeks and continues until June or July of the following year. The statute, under attack, was put into effect by the Florida Citrus Commission in January 20, 1939, as shown by copy of the resolution attached to the complaint as Exhibit "C" (R. 31). Appellees at that time were in volume production. Realizing they could not pay 32 cents per box, the appellees then attempted to carry on their businesses by a practice known as "custom canning" whereby the canners would can the citrus products for the account of the growers and charge a reasonable compensation for the canning. However, the Supreme Court

of Florida on March 17, 1939, held that such procedure was in violation of the Growers Cost Guarantee Law (*Mayo* v. *Eckerson*, 188 So. 781), and the appellant commissioner of agriculture threatened to immediately revoke appellees' licenses. Thereupon, it was necessary that the appellees close their plants until they could get the protection of an injunction and the complaint was prepared and filed within six (6) days thereafter, to-wit: March 23, 1939.

During the confusion, immediately following the passage of the resolution by the citrus commission which put the law into effect and during the time when the appellees were attempting to carry on their businesses even on a different basis, the actual canning industry was greatly curtailed and there were more than two million cases less canned during that period as compared with the period of 1936-1937 which was a comparable year because of large volume.

Therefore, the court will see that the record clearly shows the urgent need of equitable relief at the time the complaint was filed.

This court in the case of *Terrace* v. *Thompson*, reported in 263 U. S., page 197, 68 L. Ed. 255, text 274, held:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case *a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity.* *Cavanaugh* v. *Looney*, 248 U. S. 453, 456, 63 L. Ed. 354, 357, 38 Sup. Ct. Rep. 142; *Truax* v. *Raich*, 239 U. S. 33, 37, 38, 60 L. Ed. 131, 134 L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann.

Cas. 1917B, 283. See also *Ex parte Young*, 209 U. S. 123, 155, 162, 52 L. Ed. 714, 727, 730, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Adams* v. *Tanner*, 244 U. S. 590, 592, 61 L. Ed. 1336, 1341, L. R. A. 1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973; *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 506, 61 L. Ed. 1280, 1285, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88; *Home Telep. & Teleg. Co.* v. *Los Angeles*, 227 U. S. 278, 293, 57 L. Ed. 510, 517, 33 Sup. Ct. Rep. 312; *Philadelphia Co.* v. *Stinson*, 223 U. S. 605, 621, 56 L. Ed. 570, 577, 32 Sup. Ct. Rep. 340; *Western U. Teleg. Co.* v. *Andrews*, 216 U. S. 165, 54 L. Ed. 430, 30 Sup. Ct. Rep. 286; *Dobbins* v. *Los Angeles*, 195 U. S. 22, 241, 49 L. Ed. 169, 177, 25 Sup. Ct. Rep. 18; *Davis & F. Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 217, 47 L. Ed. 778, 780, 23 Sup. Ct. Rep. 498."

E. SINCE FEDERAL QUESTIONS ARE INVOLVED THE COURT HAS JURISDICTION AND MAY DECIDE OTHER QUESTIONS PRESENTED.

It has been shown that the jurisdictional amount appeared and that there were substantial federal questions involved before the three-judge court, therefore, the court acquired jurisdiction and it may decide all questions involved even though its opinion is not based upon the constitutionality of the statute. See *Fisher* v. *Brubaker*, 41 F. (2d) 774; *L. & N.* v. *Garrett*, 58 L. Ed. 229, 231 U. S. 298; *Sterling* v. *Constantin*, 287 U. S. 378, 77 L. Ed. 375; *Rice & Adams* v. *Lathrop*, 278 U. S. 509, 73 L. Ed. 480.

Since there are federal questions involved, the court has equity jurisdiction to restrain the appellant from attempting to enforce the statute under attack and to revoke the licenses of these appellees on the following grounds:

(a) The defendant has no legal authority, under law, to revoke the licenses of the appellees because of their violation of the Growers Cost Guarantee Law.

(b) The Florida Citrus Commission failed to comply with the provisions of the statute before fixing the price in that it did not "procure from the producers, shippers, or handlers of all citrus fruit not subject to the provisions of this act binding agreements to conform to and abide by its terms."

(c) That statute is so vague, indefinite and ambiguous that it is unintelligible and unenforceable.

The foregoing grounds will be argued at their proper places in this brief.

F. ARGUMENT.

I. The Only Question Presented by the Record upon This Appeal Is Whether the Three-Judge Court Abused Its Discretion in Granting the Interlocutory Injunction until the Case Could Be Heard upon the Merits.

The appeal now before this court is from the order granting the interlocutory injunction. This statement is emphasized because of its importance to the court at this stage of the case.

A reference to the record clearly shows the court what happened. On March 23, 1939, the complaint was filed. This was six days after the Supreme Court of Florida had ruled that the practice of custom canning heretofore referred to violated the statute. The defendant, commissioner of agriculture, threatened to immediately revoke the licenses of all appellees unless they paid 32 cents a box on the tree to the grower. This is not denied by appellants.

On the same day, to-wit: March 23, 1939, the district judge issued a restraining order conditioned upon the filing of a bond in the amount of five thousand dollars

($5,000.00) (R. 33). As soon as the three-judge court could be convened, a date was set for the hearing upon application for temporary injunction. On April 1, 1939, the respondent, as well as the governor and attorney general, were given notice that application would be made to the three-judge court on April 10, 1939 (R. 33). The Hon. Leon McCord, United States Circuit Judge, called to his assistance Hon. Robert T. Ervin and Hon. Alexander Akerman "for the hearing and determination of the application for temporary injunction" (R. 35). On April 10, the hearing was had, affidavits were filed, two witnesses were examined and the court allowed further time for the filing of more affidavits.

On April 28th, the court entered an order stating that the complaint came on for hearing upon motion for interlocutory injunction and the motion was granted (R. 75). The order of the court in no way attempts to dispose of the merits of the case. The court then filed its opinion on May 3 giving its reasons for granting the motion for interlocutory injunction. In substance, the court said that it appeared to it that the appellees would suffer irreparable damage unless the injunction was issued and the court, therefore, concluded that the injunction should be granted.

~~The opinion consisted of findings of fact and conclusions of law which were a sufficient compliance with the rules.~~

When the opinion was later filed, it consisted of findings of fact and conclusions of law which was a sufficient compliance with the rule. *Sparks* v. *Millwood Dairy*, 74 F. (2d) 695; *National Reserve Ins. Co.* v. *Scudder*, 71 F. (2d) 885; *Lewys* v. *O'Neill*, 49 F. (2d) 603; *Plant Products Co.* v. *Chas. H. Chemical Co.*, 16 Fed. Supp. 553; *U. S.* v. *McIntosh*, 3 Fed. Supp. 715, Cert. Den. 293 U. S. 586.

The case has not been finally disposed of but appellants complain that the action of the court was in error

under the rule laid down in the case of *Polk Co.* v. *Glover*, 305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 78, wherein it was held that the determination of the constitutional question required a hearing in due course upon the issues raised by the pleadings, which was the same ruling announced in the *Borden's Company* v. *Baldwin*, 293 U. S. 194, 79 L. Ed. 281. But in the Polk case, on a motion to dismiss, the three-judge court received affidavits in evidence and entered a final decree dismissing the bill on these affidavits. Our case is different because the court did not enter a final decree. Appellees, of course, believe and hope that the court on final hearing will be of the same opinion as it was at the time of the hearing of the application for interlocutory injunction but if appellants have any testimony that would show a different state of facts, they have ample opportunity to present the same. The answer was filed by the appellants approximately thirty days after the appeal and it is therefore not before this court on this appeal.

The fact that the district court in its opinion stated that it held the act unconstitutional was brought about by the urgent request of the appellants that the court immediately determine the constitutionality of the act. The whole industry was in confusion, the Commissioner of Agriculture of the State of Florida and the Florida Citrus Commission, representing the industry, wanted and requested an immediate decision on the constitutionality of the act. They cannot now complain of the holding of the court.

Appellants are taking a most inconsistent position before this court. First, they point out and urge, as we do, that the hearing had was upon interlocutory injunction. Next, it is contended the court finally determined the cause. To this, we do not agree. Next, appellants contend that the court should have held the act constitutional. Their brief is devoted largely to arguments of the constitutionality of the act. Under the Polk and

Borden cases, it certainly would have been in error for the court to have declared the act constitutional and to have dismissed the suit; therefore, we cannot agree with counsel that the question before this court is the constitutionality of the act. Certainly the lower court could not have found that the statute appeared to be constitutional and, at the same time, grant the injunction. We recognize that one of the important elements controlling the three-judge court's discretion was the seriousness of the constitutional question; how likely it appeared in the court's judgment that the act would eventually be held unconstitutional. For the purposes of temporary relief only, the district court held the act unconstitutional but its opinion on the constitutionality of the act is subject to revision after the full hearing. The duty of this court upon appeal from an order granting or denying an interlocutory injunction has been definitely announced on many occasions. The first announcements of this court were that the granting or dissolving of a temporary injunction rests in the sound discretion of the court and furnishes no ground for an appeal. *Buffington* v. *Harvey*, 95 U. S. 99.

Later in *Meccano* v. *Wannamaker*, 253 U. S. 136, 64 L. Ed. 822, the court said:

> "The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. * * * The informed judgment of the circuit court of appeals, exercised upon a view of all relevant circumstances, is entitled to great weight. And, except for strong reasons, this court will not interfere with its action."

In *Prendergast* v. *N. Y. Telephone Co.*, 262 U. S. 43, 67 L. Ed. 853, Mr. Justice Sanford discussed this proposi-

tion of law. In that case, application for an injunction against an enforcement of rates established by a public service commission was made to the three-judge court upon the ground of the unconstitutionality of the rates. The three-judge court granted the injunction and there was an appeal ~~from~~ to this court wherein the statement of law in the *Meccano Case, supra,* was again stated. The court also said:

> "Especially will the granting of a temporary writ be upheld when the balance of injury as between the parties favors its issue."

Mr. Justice Sutherland, in *Rice & Adams* v. *Lathrop,* 278 U. S. 509, 73 L. Ed. 480, said:

> "An interlocutory injunction, at least ordinarily, is not a matter of strict right; but the application is addressed to the sound discretion of the court. 1 High, Inj., 4th Ed., Secs. 11 and 937. And here the trial court denied the application, not because it would have been error to grant it, but in the exercise of its discretion, principally based upon a balancing of the relative conveniences which might result. This is made clear by the trial judge, who, interpreting his own action, expressly held that the relief sought was grantable but was only denied by the court in the exercise of its discretion. That the case was one for the exercise of discretion is plain. *Id.*, Section 937; *Southwestern Brush Electric Light & P. Co.* v. *Louisiana Electric Light Co.,* (C. C.) 45 Fed. 893, 895, 896; *Whitcomb* v. *Girard Coal Co.,* (C. C.) 47 Fed. 315, 317, 318; *Rousso* v. *Barber,* (C. C. A.) 276 Fed. 552, 553. The order denying the injunction, therefore, was conclusive in an appellate court; and an order granting it would have been equally so. *Buffington* v. *Harvey,* 95 U. S. 99, 100, 24 L. Ed. 381, 382."

The same rule is announced in *State of Alabama* v. *United States,* 279 U. S. 229, 73 L. Ed. 675, where the Meccano case is again cited and followed.

An often-cited case on this point is *Love* v. *Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, Circuit Court of Appeals, Eighth Circuit, Mr. Justice Sanborn delivered the opinion of the court and after pointing out that application for interlocutory injunction is addressed to the discretion of the trial court, not to that of the appellate court, stated that the only question involved on the appeal is "*Does the proof clearly establish abuse of that discretion?*" The court also said:

> "The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. It is a familiar rule of equity jurisprudence that if the questions presented a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great, and irreparable if the motion for the interlocutory injunction is denied and the final decision is in his favor while if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable or probably may be indemnified by a bond, the injunction usually should be granted."

The three-judge court in our case was no doubt influenced by the rule announced by Mr. Justice Sanborn to the effect that if the injury to the moving party will be great, certain and irreparable, if the injunction is denied and final decision is in his favor, while, if the decision is otherwise, and the injunction is granted, the inconvenience and loss to opposing party will be inconsiderable. Of course, there was no inconvenience or loss whatsoever that could be sustained by the appellants in this case. From a practical standpoint, as found by the three-judge court, there would be no loss even to the grower of citrus fruit in Florida if the injunction be granted. Because of the statute involved, his fruit was

falling from the trees and rotting in the groves and the grower could not recoup any part of his cost of production. By the granting of the injunction, the law of supply and demand could at least help him to some extent.

This court in *Ohio Oil Company* v. *Conway*, 279 U. S. 813, 73 L. Ed. 972, approved the rule announced in the *Love Case, supra*. There are numerous other authorities along the same line with *Munoz* v. *Porto Rico*, 83 F. (2d) 262, as a good example.

From a study of the decisions of this court, we find that it generally disposes of appeals from interlocutory injunctions by affirming upon the authority of cases holding that the matter rests in the sound discretion of the trial court. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 120, 79 L. Ed. 1032; *Langer* v. *Grandin Farmers Cooperative Elevator Co.*, 292 U. S. 605, 54 S. Ct. 772, 78 L. Ed. 1467; *Northwest Bancorporation* v. *Benson*, 292 U. S. 606, 54 S. Ct. 775, 78 L. Ed. 1468; *South Carolina Power Co.* v. *South Carolina Commission et al.*, 286 U. S. 525, 52 S. Ct. 494, 76 L. Ed. 1268; *Ogden & Moffett Co.* v. *Michigan Public Utilities Commission*, 286 U. S. 525, 52 S. Ct. 495, 76 L. Ed. 1268; *United Drug Co.* v. *Washburn*, 284 U. S. 593, 52 S. Ct. 202, 76 L. Ed. 511.

Appellants do not, in their brief, seriously contend that the three-judge court abused its discretion in granting the injunction. As we understand their contentions they consist of criticism of the manner in which the three-judge court conducted the hearing and that the findings of the court were not supported by the facts.

In the first place, we know of no rule of law that binds the hands of the trial court to rigid rules on application for temporary injunction.

It is, of course, customary on applications for injunctions to use affidavits of evidence; however, there is nothing in the rules that prohibits the court from taking additional testimony by way of sworn witnesses. This case was of vital importance to the appellees and repre-

sentatives of two of the plaintiffs were produced, each of whom had been in the canning business in the State of Florida for many years and who were capable of lending assistance to the court in arriving at the facts. They were submitted and subjected to cross examination by counsel for appellants. Certainly, there can be no justified criticism of the court because it heard two witnesses.

To the surprise of the appellees, appellants, after the argument, produced the affidavit of one J. F. Mays (R. 68), and thereupon appellees requested time to file rebuttal affidavits to the Mays affidavit. Mays says in effect that the law was fairly and uniformly enforced against all canners. To refute this, a certified copy of the resolution of the Florida Citrus Commission was thereafter filed by the appellees on April 15, wherein the Florida Citrus Commission recognized that the law had not been enforced against all handlers, pointing out in the resolution that the auction sales of grapefruit showed that the producer was not receiving his cost of production and "it is generally felt that all the canners are not paying the cost of production" (we later show that the co-operative canners and grower-owned canneries were not), and, then, the citrus commission by its resolution calls upon the commissioner of agriculture to enforce the law upon all handlers, shippers, and canners alike or, if in his opinion there was any reason why the law should not be enforced, to then inform the commission. This resolution was unanimously adopted on March 21, 1939, by the Florida Citrus Commission (R. 69, 70).

The affidavit of John A. Snively, filed by appellees on April 15, states that Polk Packing Association, a co-operative canning association of which the affiant was president, had canned for its grower members between January 19 and March 23, 1939, between sixty thousand (60,000) and seventy thousand (70,000) cases of grapefruit and that the association was unable to sell the fin-

ished product at a price that would yield the grower members 32 cents a box on the tree, that finally, after other co-operative associations and grower-owned canning companies had quoted the finished product at a lower price, the said Polk Company sold approximately fifty thousand (50,000) cases of said grapefruit juice at a price which would yield the grower a price less than 32 cents a box on the tree (R. 71).

Affiant further said that if the law was enforced against his association, the association would have to take the loss in its operation and that, therefore, each grower member would have to suffer his proportionate part of the loss and that he would not therefore receive his 32 cents a box (R. 72).

Affidavit of Ralph Polk, Sr., president of The Polk Company, one of the plaintiffs and a canner who had been in the business in the State of Florida for over eighteen (18) years, refutes the statements in the affidavit of Mays (R. 72). Mr. Mays made the statement that canning plants had operated and paid 32 cents and made a profit but Mr. Polk shows clearly that it was impossible for any canning plant to tell what profit it had made until the season had been completed and the finished product sold and disposed of (R. 73). Affiant further stated that he knew of his own knowledge that many growers had delivered their fruit to the co-operative associations and received returns far less than 32 cents a box, that he knew there were large volumes of the canned product which had been canned by the co-operatives and that they had not paid the grower 32 cents a box and that these canned products were being offered in competition with the products of the plaintiffs (R. 73). Affiant further stated that since the law became effective, it had been necessary for his company to cease operations and in order to meet the requirements to buyers, it had been forced to purchase large volumes of canned grapefruit from co-operative and grower-owned canning

plants at prices insufficient to return to the grower the cost of production as fixed by the citrus commission and that he knew the canned products he had purchased had been canned after the act went into effect and before the temporary injunction was issued.

The foregoing, to our mind, was clear and convincing evidence showing to the court the need for immediate injunctive relief and we see nothing "unusual, undignified and cumbersome" as claimed by appellants.

Appellants seem to make much of the fact that the opinion of the three-judge court was dated April 13, 1939, although additional affidavits were not filed until April 15. In the first place, the opinion was not rendered until May 3, 1939, which was long after the affidavits had been filed. Of course, we do not know what happened but we might surmise that the evidence which it had already heard had been sufficient and it wrote the opinion but held the same up until the other affidavits were filed. Certainly, such an irregularity, if it may be called that, would not justify this court in reversing the lower court.

Appellants devote many pages of their brief to attempts to show this court the findings of fact by the three-judge court were not supported by the record. It is simply unnecessary to burden this court with what would necessarily have to be a long, detailed analysis of the record to refute the contentions of the appellants. The three-judge court was interested to know whether the facts would warrant the issuance of a temporary injunction. The statute appeared to the three-judge court to be unconstitutional and the facts showed irreparable loss and damage to the appellees unless the injunction was issued.

There was only one point in the case where there was any contradiction in the evidence and that was as to whether the commissioner of agriculture did, in the interpretation of the act and the enforcement thereof,

discriminate against the plaintiffs. We have already referred to the evidence on this question and the lower court made a finding on it and certainly there is no showing nor can there be any showing from the record that the court was clearly wrong in making this finding.

Appellants find fault with the statement in the opinion of the three-judge court that the industry is dependent upon the canners as much as upon the growers and for several pages points out to this court the primary importance of the growers. Of course; the industry cannot survive without the grower, neither can the industry survive without the opportunity to can approximately one-half of the volume so that it may be preserved and used by the public throughout the year. Appellants state that this act is for the protection of the grower. Surely, that is what the legislature had in mind but it cannot do this to the detriment of a material part of the industry and to the public generally.

We would be living in the often referred to "Utopia" if the legislative branch of the government could guarantee to all people a profit in their line of endeavor. There is not one of the appellees that would not be glad to see the grower make a profit in his occupation.

Appellants say that the industry will die if the growers are not taken care of. Canning will die, too, if it is to be throttled by such legislation. It is unfortunate if the grower is unable to get his cost of production in one year when there happens to be a surplus, but there is no law that makes him keep in that business. He can go into some other line of endeavor. If the canner cannot make a living in the canning business, he can go into another line of endeavor. Suffice it to say that if the legislature by such legislation can insure to the canning industry that it would never take a loss even when the market are "flooded" then business men would all want to get into the canning business and, as a result thereof, there would be an overproduction of

canned products and finally the entire industry would fall of its own load.

II. The Statute and Regulation Deprive the Appellees of Their Property Without Due Process and Deny to the Appellees Equal Protection of the Laws in Contravention of the Fourteenth Amendment.

The objections under the fourteenth amendment to the statute and regulation rest upon three propositions: (a) the statute and regulation are unreasonable, arbitrary and capricious; (b) the statute and regulation are discriminatory in that the effect of the same is to discriminate against the appellees, who may be referred to as independent canners, and in favor of co-operative and grower-owned canners, who are in the identical line of business and are actual competitors; and (c) the statute does not provide for a full hearing before determining the cost of production and no hearing was had by the commission.

Under these two subjects will be discussed the right of a legislature to regulate business generally, what businesses are affected with a public interest, the reasonableness of the statute, equal protection of the laws, necessity for a hearing after notice and other kindred points.

(a) The Growers Cost Guarantee Law and Regulation Passed Thereunder Are Unreasonable, Arbitrary and Capricious and Deprive Appellees of Their Property Without Due Process of Law.

It is realized that cases involving the field within which the police powers of a state may be appropriately exercised without undue encroachment upon fundamental, personal and property rights granted by the Federal Constitution usually present difficult questions for the judicial branch of the government to decide but they are questions which, under our form of government, must be decided otherwise constitutional guaranties would become "mere scraps of paper."

However, at the outset, may we say that, after diligent search, we were unable to find where any legislature has passed any act similar to the one under attack. Usually regulatory legislation takes into consideration morals, health, or public welfare and most cases deal only with services or labor. We find where certain businesses have been regulated because of necessary sanitation problems, others because of monopoly. Here, we have a statute directed to one portion of an industry, to-wit: the growers and attempting to fix the price of a commodity. The court knows that citrus fruit is subject to rot and decay but that the same may be preserved in cans for long periods of time. True, citrus fruit is not subject to contamination and spoilation such as milk, which cannot be preserved in its fresh state for long periods of time. The Florida legislature in fixing the price of grapefruit did not give any consideration whatsoever to other phases of the industry, to those who are canning approximately one-half of the grown citrus, to the thousands working in canning plants, to those who are packing and shipping, to those who are distributing and, finally and most important, to those who consume it.

The statute under consideration does not take into consideration the value of the commodity, nor of the ability of the purchaser to pay a fixed price but only attempts to protect the grower by saying that each year he must be paid his cost of production. The statute provides that it is only to be effective when the commissioner of agriculture, with the consent and advice of the governor, declares the existence of a state emergency in the citrus industry. In other words, as long as there is no emergency and as long as the grower is making money in his adventure, the statute is ineffective. One year market conditions, may we say if affected by world-war conditions, may be such that the grower will receive (10) ten times his cost of production but if the next year economic conditions are different and the public is unable

to pay his cost of production, the legislature then, under this act, says that he cannot sell his fruit; therefore, the act in effect grants to the grower a profit.

All price-fixing laws, which we have found, are tested by the rule as to whether the public welfare and public interest are so great that they over-balance the personal guaranties and liberties of the Constitution. In the statute under attack, the public is given no consideration whatsoever and the price fixing was not in the interest of the public but only in the interest of one portion of the industry, not even affecting all growers but only those who grow a particular variety of citrus—grapefruit.

In other words, we are dealing with an act by which the state, acting through a board, assumes to exercise the power to fix the price to be paid for a common agricultural commodity. It is not a statute regulating a business or an industry; it is not a statute regulating a public utility, nor a paramount or basic industry, nor one directly or materially affecting the public health, such, for instance, as the dairy industry but it is a statute which attempts to say to the people of the United States and of the world, "you must pay for grapefruit such a price that will enable dealers or canners in Florida to pay to our Florida growers their cost of production."

Whether the fixing by the state of a growers cost price for every commodity in the state would constitute a wise policy, is not for this court to say but this court must decide whether the same can be done for the growers of one variety of a commodity of one state under the Constitution of the United States as it now stands.

Our forefathers, after they had won their independence and liberty at so great a price, probably believed that they had found the answer to all social problems in individual liberty and free competition but they also knew that individual liberty would not permit them to do absolutely as they pleased, regardless of the effect of their

conduct on the general public or on the liberties and rights of other individuals; what they, evidently, had in mind was the attainment of that liberty which would protect the citizens in the enjoyment of life, liberty, and property.

The law is well settled that a legislative declaration that a business is impressed with a public interest and demands regulation under the police power or in the public interest is not conclusive but is a matter which is always open to judicial inquiry.

These concepts must stand or fall on the particular factual background, but in no case should either concept be used as an instrument of abuse or to write into the law group concepts of social justice in total disregard of the rights of the public.

It was held in *State* v. *Ives*, 123 Fla. 401, 167 So. 394:

> "Freedom of contract is the general rule; restraint is the exception and when it is exercised to place limitations upon the right to contract the power, when exercised, must not be arbitrary or unreasonable, and it can be justified only by exceptional circumstances. *Ex parte Messer*, 87 Fla. 92, 99 So. 330."

The Supreme Court of Florida in *Whitaker* v. *Parsons*, 80 Fla. 352, 86 So. 247, stated:

> "The purpose of constitutional government is to secure individual rights subject to valid regulations *enacted in the interest of the public good.*"

The courts, at all times, must remember that in any regulations adopted, the exercise of the police power must be deemed to be fairly necessary to secure some object directly affecting the public welfare. The Fourteenth Amendment prohibits the states from striking down personal rights but the law has recognized the power of the state to curtail personal rights incidentally necessary for the accomplishment of some other paramount object and one that concerns the public welfare.

Although there appear to be certain conflicting announcements by the several courts, involving the rights of the state to limit and regulate personal rights guaranteed by the Constitution, we believe that the foregoing statements of law fairly present the general principles which should, at all times, guide the courts in determining these troublesome questions.

We take it as true that each set of facts involved in each case must be tested by the constitutional requirements and this has, naturally, led to decisions of the many courts, which, at first blush, seem to be conflicting.

In determining whether a business may be regulated by the state, we must first consider the extent to which the public is interested in the business. Not so many years ago, it was thought that only those businesses could be regulated which were "affected with a public interest"; that is, that the individual "had granted to the public an interest in the use of his business." However, those expressions have been further discussed by this court in later cases and the courts have attempted to get away from those expressions.

No particular formula or test has been unanimously agreed upon as final or conclusive but it seems from the studying of the cases, that when a business has been found to be affected with a public interest or, in other words, that the public welfare must be recognized in the business, then the state legislature may make reasonable regulations of its use *for the protection of the public* in its relation to those who carry on such a business.

On the other hand, when a business is actually devoted to public use such as railroads, other common carriers, etc., the states may regulate not only the use of the business but the compensation to be paid for it.

An examination of the cases clearly shows that it is not every business or profession which has been subjected to police regulations that may also be subjected to price fixing. Doctors, lawyers, osteopaths, public accountants, trust companies, hotels, etc., are all regulated

but the mere fact that the legislature has power to regulate professions, trades, etc., does not mean that it has the power to fix the prices.

There must always be a real connection between the provisions of a police regulation and its purpose and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained. Even where price fixing has been upheld, it has always been as an incidental part of general regulations of an entire business. In order to regulate the business, it has sometimes been necessary to regulate the prices; but, in the statute under discussion, there is no attempt to regulate the citrus business whatsoever; there are no regulations involved in the statute, only the price-fixing provision. The statute which has no real, substantial or rational relation to the public safety, health, morals, or general welfare, invades the rights secured by the Constitution and cannot be sustained under the police power.

We, of the legal profession, selfishly consider that our profession is affected with public interest to a great extent. We must realize that there are some unfair practices among the members of our profession and, yet, we do not think any court would ever say that the legislature, under police power, could set the minimum fees for the lawyers and thereby cure the avowed evil. That is the situation in the statute under attack. The legislature found "that unfair, unjust, destructive, demoralizing and uneconomic trade practices have and continue to be carried on in this state." Does the fixing of the price to be paid the grower have any real or substantial relation to the object sought to be attained?

If the finding of the legislature is correct, then there are now in existence laws which would prevent the alleged evil.

Before discussing the many announcements of this court, we think it might be of benefit to submit to this court our reasons why the case of *Nebbia* v. *New York*,

291 U. S. 502, 78 L. Ed. 940, is not controlling because appellants at the hearing based all of their contentions on this case. In the first place, the Nebbia case was dealing with the statute regulating the price of a valuable food product produced in all states and of universal consumption throughout the State of New York; milk, one of the prime necessities of life to tens of thousands of people, a necessary article of diet; a product liable to contamination and adulteration. The New York statute was dealing with the entire industry of that state and not just a portion.

In referring to the Nebbia case, Mr. Justice Roberts, in *Borden's Farm Products* v. *Peter G. Ten Eyck*, 297 U. S. 251, 80 L. Ed. 669, recognized that the price fixing provisions had been upheld "in the circumstances existing in the State of New York in 1933" which emphasizes the fact that the peculiar circumstances in the industry prompted the court in upholding the law.

In the *Borden Case, supra,* this Honorable Court upheld the differential in the prices as between milk dealers having a well-advertised trade name and those which did not but pointed out "the prices paid by dealers to producers under the Milk Control Law, have been the same for all dealers no matter how classified." The court very clearly stated "we have no occasion to determine whether the differential would become unlawful, and the appellant would be entitled to relief, if there were proof that in practice it produces such gross inequality, and so unnecessarily damages the appellant, as to shock the conscience."

On that particular point, may we respectfully call the court's attention to the fact presented in the instant case, to-wit, that the gross inequality produced by the statute under attack makes it impossible for the appellees to compete with their competitors. The statute did not provide that grower-owned canneries and co-operative canneries could buy grapefruit at a differential price from

the plaintiffs as independent canners, nor that they could sell their finished product at a differential price. The legislature must have known that there was no reason under the sun to make such differential but the act even went further and said, as interpreted by the commissioner of agriculture, that the grower-owned canneries and co-operative canneries could pay for their raw products whatever price they desired. In other words, they could buy the product at the market price which, as shown by the record, was less than the fixed price and they could can the product and put it on the market at a price which, as shown by the record, was less than the fixed price and would absolutely destroy the businesses of the appellees including their large investments. This should meet the ruling in the Borden's case in that it would "shock the conscience." On this particular point, the statute and the regulation are not only unreasonable, capricious and unfair but discriminatory in the highest degree.

This court in *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266, 80 L. Ed. 675, struck down the differential provision so far as it attempted to apply to dealers entering the business after a certain date, stating through Mr. Justice Roberts:

> "The appellant had not a well-advertised trade name. The reason for refusing it a license was that though it had not been continuously in the business of dealing in milk since April 10, 1933, it had sold and was selling to stores milk at a price a cent below the established minimum price. The question is whether the provision denying the benefit of the differential to all who embark in the business after April 10, 1933, works a discrimination which has no foundation in the circumstances of those engaging in the milk business in New York City, and is therefore so unreasonable as to deny appellant the equal protection of the laws in violation of the Fourteenth Amendment. The record discloses no reason for the discrimination."

It was further said in that case:

> "This is but another way of saying the legislature determined that during the life of the law no person or corporation might enter the business of a milk dealer in New York City."

This later statement is very appropriate to the act under discussion because our legislature has attempted to say not only that during the life of the law no independent canner could enter the business but it went further and in effect said that during the life of the law, those canners then in the business in the State of Florida would have to go out of business and close their doors. And, while fruit was rotting on the trees, due to the fact that market conditions would not permit payment of 32 cents by the appellees, the grower-owned plants were canning their products costing less than 32 cents.

The court, in the *Mayflower Case, supra*, held that such classification was arbitrary and unreasonable and denied the appellant the equal protection of the law.

Since it has been clearly shown that the facts and circumstances of each case must be thoroughly analyzed by this court before it can determine the validity of an attempt to regulate the same, we say that the Nebbia case is no authority whatsoever for the contention that the Florida Growers Guarantee Law is valid.

A case more nearly in point is *Williams* v. *Standard Oil Company*, 278 U. S. 235, 73 L. Ed. 287, which was a suit involving the Tennessee statute attempting to regulate the price of gasoline. In the opinion of Mr. Justice Sutherland, it is pointed out that a business is not to be regulated merely because it is large or because the public is warranted in having a feeling of concern in respect to its maintenance. In that case, in support of the act, it was urged that gasoline was of wide-spread use; that enormous quantities were sold in the State of Tennessee; that it had become necessary and indispensable in carrying on commercial and other activities within

the state. This court stated that it was concerned with the character of the business not the size or the extent to which the commodity was used and pointed out that gasoline was an ordinary article of trade, differing in no essential respect from other articles commonly bought and sold by merchants. The court also held unconstitutional a provision of the act making it unlawful to grant any rebates, concessions, or gratuities to any purchaser for the purpose of inducing the purchaser to use gasoline of the particular dealer saying that these provisions "are unconstitutional restrictions upon the right of the private dealer to fix his own prices."

In 1927, Mr. Justice Sutherland in *Tyson & Bros. United Theater Ticket Offices, Inc.*, v. *Banton*, 273 U. S. 418, 71 L. Ed. 718, very exhaustively discussed regulatory laws and particularly price-fixing laws. In that case as well as in ours, plaintiff brought a suit to enjoin the respondents from revoking plaintiff's license on alleged threats on the part of the respondents to forfeit the license of the plaintiff. In the complaint in this case, it is alleged that the commissioner of agriculture has threatened to revoke the licenses of each of these appellees if they failed to abide by the statute under attack. In the Tyson case the jurisdiction of the district court was sustained. The court again announced that the right of an owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself and within the protection of the due process of law clauses of the Fifth and Fourteenth Amendments (citing cases). The court said:

> *"The power to regulate property, services, or business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all. The authority to regulate the conduct of a business or to require a license comes from a branch of the police power and*

*which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business. * * * The latter power (referring to price fixing) is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on."*

We pause in discussion of the Tyson case to again emphatically call to the attention of this court that the statute and regulation under attack in this case do not attempt in any manner to regulate the citrus industry or even the canning industry and the price fixing is not an incident to other regulations but it fixes the price to be paid the grower of an agricultural commodity without any attempt to regulate the industry or any portion of it or without any reference or consideration for the public welfare. This is a novel attempt by the legislature of Florida and finds no precedent in any other statutes.

Referring again to the *Tyson Case, supra,* we feel that the principles announced in the opinion in that case could very properly be quoted in full in this brief in support of the contentions of the appellees, but this court is thoroughly familiar with that case and it has been cited innumerable times to this court and by this court.

Price fixing is commonly directed toward the prevention of exorbitant demands, and the element common to all price-fixing laws is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a large number of the members of the community. Laws regulating prices have been in the interest of the public welfare. Legislatures have attempted to fix maximum

prices or charges so as to protect the public, such as the maximum profit to be made by the handlers of tickets as in the *Tyson Case, supra*, and the maximum charges for handling tobacco or the maximum sales prices of milk or of other essential commodities so that the public may be protected and that people dealing with the sellers may have some protection. But, in our case, we find the very opposite. It is not a maximum law but a minimum law and cannot be for the protection of the public or for a large number of the members of a community. Even if we assume that the large number of the members of the community sought to be protected are the growers, the three-judge court very clearly pointed out that the effect of the law is not to protect even the growers because the grower may have invested $10,000.00 in the cost of production of his crop of grapefruit, that he may be able to sell the same for $8,000.00 at the market price and, therefore, recoup part of his investment but, under the statute, he would be forced to permit the same to fall in the groves and rot thereby suffering a loss of $10,000.00 instead of $2,000.00.

In the *Nebbia Case, supra*, it was stated that

> "the means selected shall have a real and substantial relation to the object sought to be attained."

Applying this test, it is unnecessary to go into any great detail to show that the means selected has no real and substantial relation to the object sought to be attained. As an example, the legislature says that the "present acute, economic condition in Florida is in part the consequence of a severe and increasing disparity between the prices of citrus fruit and other commodities." The means selected to cure this evil is to set a uniform price on citrus fruit at the grove without taking into consideration in any manner or form whatsoever the price of any other commodity. Is it not asking too much when the legislature requests the courts to shut their eyes to

the fact that other commodities do not always bring the cost of production? Will the fixing of a production cost price to the growers of grapefruit alone decrease the disparity between the citrus and other commodities? The court will note that the regulation under attack attempts to fix the cost of grapefruit only and does not even take into consideration the cost of similar commodities, not even oranges.

Again it is stated by the legislature that "it is expedient and necessary to build up the quality of Florida citrus fruit in the market." The means selected is to set a minimum price to be paid to the grower for grapefruit which, of course, kills any incentive for the grower to have any care whatever for the quality of his fruit. Why should he be interested in making soil analysis, making the proper applications of fertilizer, or of irrigation, or of spraying as he knows that he will get a certain price for his fruit regardless of his quality. How can it be said that fixing the cost of production for grapefruit will raise the quality and reputation of other Florida citrus fruit. The means selected has no relation to the object sought to be attained.

In *Fairmont Creamery Company* v. *State of Minnesota*, 274 U. S., page 1, 71 L. Ed. 893, this court held unconstitutional a state statute forbidding creameries to purchase cream at higher prices in one locality than another locality, after allowance for differential in cost of production, on the ground that the same violated the Fourteenth Amendment, also because it had no reasonable relation to the legislative purpose, and referring to numerous cases cited said:

> "But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment and to declare it invalid when without substantial relation to some evil within the power of

the state to suppress and a clear infringment of private rights."

In *New State Ice Co. v. Liebman*, 285 U. S. 262, 76 L. Ed. 747, the State of Oklahoma had passed an act to regulate the manufacture, selling and distributing of ice which provided, among other things, that no one could go into the business unless it first obtained a license from the state. The New State Ice Company engaged in the business without a license and brought the suit to enjoin enforcement of the act. The court pointed out that all businesses may be subject to some measure of public regulation and said:

"* * * plainly a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504, 513, 68 L. Ed. 813, 826, 32 A. L. R. 661, 44 S. Ct. 412, and authorities cited; *Louis K. Liggett Co. v. Baldbridge*, 278 U. S. 105, 113, 73 L. Ed. 204, 208, 49 S. Ct. 57.

"Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another

from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed."

In *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. Ed. 913, the court held that a state had power to regulate the business of an employment agency but did not have power to fix charges for services rendered, recognizing the difference between the right to regulate and the right to fix prices and said:

> "* * * *the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power* * * * *to urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulation but not for price fixing, as we have already definitely decided.*"

Munn v. *People of Illinois*, 94 U. S. 113, 24 L. Ed. 77, has been cited to this court on so many occasions that we think it unnecessary to fully analyze the principles enunciated therein. Mr. Justice Waite very clearly gave the historical background of the Fourteenth Amendment and when referring to the limitations on personal liberty and use of personal property by police power said:

> "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, *when such regulation becomes necessary for the public good.*"

Is the regulation involved in this suit necessary for the public good? The proven effect of the regulation is

to cause a healthful food product, grapefruit, to lie in the groves and rot, is conducive of poor quality of fruit rather than better quality and deprives the appellees of their right to engage in the canning industry free of arbitrary restraints. When it stops a pay roll of approximately $100,000.00 a week to approximately 5,000 people and practically destroys the investments of the appellees totaling some $2,000,000.00, is the regulation in the interest of the public? When the regulation stops the flow into interstate commerce of millions of cans of health producing fruit, can it be reasonably said that it is for the public good?

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 67 L. Ed. 322, text 326, it is warned that "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

An often-cited case is *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 67 L. Ed. 1103, dealing with the power of the states to pass regulatory laws that do not contravene the Fourteenth Amendment. In that case it was said:

> "It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified."

The court pointed out that regulation of food preparation has never extended to fixing prices to the public, that there is no monopoly in the preparation of foods and that the prices charged are fixed by competition throughout the country at large. It further says "given uninterrupted interstate commerce, the sources of the food supply in Kansas are country-wide, a short supply is not

likely, and the danger from local monopolistic control less than ever." So appropriately can this be applied to the grapefruit industry.

The record shows that grapefruit is now being grown in Texas and other areas in large commercial volumes, as well as in Florida, and an attempt by one state to fix the price to the grower of grapefruit within that state can do no more than to cause chaos in the grapefruit industry. The legislative department cannot increase the value of grapefruit by a fixed price to the producer of Florida grapefruit. This can mean but one thing—that when the competition from Texas and Arizona and other producing areas, backed by a large supply, lowers the value of grapefruit to the public below the cost of production then, under the statute of Florida, the grapefruit in Florida must stay on the trees and rot (R. 7, 50, 51).

If 32 cents is the average cost of producing grapefruit in Florida, then evidently, some grapefruit is produced for less than 32 cents in certain portions of the state, depending upon the soil conditions, etc. Under the law, those producers are guaranteed a profit. It can readily be seen the results of this—more people will go into the business of producing grapefruit until, finally, we will have such an enormous production that the entire industry will have to fall of its own load.

This very situation has happened under voluntary marketing agreements affecting peaches, so we are advised. If this statute is constitutional, the State of Florida will be forced to protect all its other producers of other agricultural commodities by fixing an average cost of production and providing that their products cannot be sold for less with the result of a complete economic breakdown.

The *Old Dearborn* v. *Seagram Distillers Corp.*, 299 U. S. 183, 81 L. Ed. 109, decided only three years ago, the court recognized that the authorities we have heretofore cited hold that the right of the owner of the property to

fix the price at which he will sell it is an inherent attribute of the property itself and within the protection of the Fifth and Fourteenth Amendments. Mr. Justice Sutherland, speaking for the court, said:

> "In respect of the due process of law clause, it is contended that the statute is a price-fixing law, which has the effect of denying to the owner of property the right to determine for himself the price at which he will sell. Appellants invoke the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments. *Tyson & Bros. United Theater Ticket Offices* v. *Banton*, 273 U. S. 418, 429, 71 L. Ed. 718, 722, 47 S. Ct. 426, 58 A. L. R. 1236; *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 537, 67 L. Ed. 1103, 1109, 43 S. Ct. 630, 27 A. L. R. 1280; *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. Ed. 913, 48 S. Ct. 545, 56 A. L. R. 1327; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 73 L. Ed. 287, 49 S. Ct. 115, 60 A. L. R. 596; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 76 L. Ed. 747, 52 S. Ct. 371. These hold that, with certain exceptions, which need not now be set forth, this right of the owner cannot be denied by legislative enactment fixing prices and compelling such owner to adhere to them."

This court in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 81 L. Ed. 703, held:

> "In forbidding the deprivation of liberty without due process of law, the constitution does not recognize an absolute and uncontrollable liberty, the liberty safeguarded being liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people."

In *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 38 L. Ed. 1014, Mr. Justice Brewer said:

> "It has always been a part of the judicial function to determine whether the act of one party

(whether that party be a single individual, or an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without compensation. The equal protection of the laws, which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation in whatever form it may be enacted by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

It was also pointed out in that case "that a valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual."

The Supreme Court of Illinois in *Chicago District Park* v. *Canfield*, 19 N. E. (2d) 376, 121 A. L. R. 557, said:

"The rule recognized in this state is that all uses of property or courses of conduct which are injurious to the health, comfort, safety, morals and welfare of society may be prohibited under the sovereign power of the state, though the exercise of such power results in inconvenience or loss to individuals. The exercise of such power, however, must find basis in the doctrine of overruling necessity or bear some substantial relation to the public good. Laws which impose a penalty upon an individual, or interfere with his personal liberty, cannot be sustained unless they find basis in public health, comfort, safety or welfare. An arbitrary invasion of

the personal rights of an individual citizen under the guise of police regulation is not countenanced. While the General Assembly may first determine when the necessity exists for the exercise of this power, such determination is not final or conclusive. What are the subjects of its exercise is a judicial question."

III. The Statute and Regulation Constitute a Direct, Unconstitutional Interference with Interstate Commerce.

The record shows that, during the past decade, the anning of grapefruit and grapefruit juice with other itrus fruits has developed into one of the principal in-ustries of the State of Florida; that the volume of canned rapefruit and grapefruit juice has continued to increase ntil the year 1937-1938 there were approximately seven illion cases produced in Florida (R. 3); that practi-ally the entire pack (99%) is canned solely for and goes nto interstate commerce, being sold in almost every state f the United States and in foreign countries; that the mount of canned citrus products consumed in the State f Florida is negligible. The appellees purchase grape-ruit in Florida solely for the purpose of interstate com-nerce, process the same by putting it into cans and then hip it into interstate commerce or foreign countries.

Appellant contends that "until such time as a com-nodity actually commences its journey from one state to nother, the state in which the commodity is located has ull jurisdiction to regulate its manufacture and pro-luction."

That this statement is patently so narrow as to be ncorrect may be seen from the following cases:

Stafford v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735.

Santa Cruz Fruit Packing Company v. *National Labor Relations Board*, 303 U. S. 453, 82 L. Ed. 954.

National Labor Relations Board v. *Fainblatt*, 83 L. Ed. Advance Opinions, page 646.

But, if this statement be conceded correct without qualification, there is still the question whether it is applicable to the case at hand. The rule might be appropriate if one were dealing with the power of Congress to regulate a business and the inquiry was whether the particular transaction formed a part of the flow of interstate commerce; but in the present case a different question is involved and a different rule must be applied. Here, a state has attempted by statute to impose an arbitrary condition upon the sale of a product destined for interstate commerce. As was alleged and proved by appellees, the condition was so burdensome and so severe as to cause *all* commerce of the independent canners, of which commerce 99% was interstate, immediately to *cease*. This result was not denied by appellant. Yet, appellant says that the statute imposed no burden on interstate commerce.

In *Baldwin* v. *Seelig*, 294 U. S. 511, 79 L. Ed. 1032 (1934), the New York Milk Control Act was attacked in so far as it prohibited the sale within the state of milk brought from outside the state, unless the prescribed minimum price had been paid the producers outside the state. The court, in holding it was a burden upon interstate commerce and, therefore, unconstitutional, said:

> "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there * * * Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. Imposts or duties upon commerce with other countries are placed by an express prohibition of the constitution, beyond the power of a state, 'except what may be absolutely necessary for executing its inspection laws.' Constitution, Art. I, Sec. 10, Clause 2; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. Ed. 382. Imposts and duties upon interstate commerce are placed beyong the power of a state, without the mention of an excep-

tion, by the provision committing commerce of that order to power of the Congress. Constitution, Art I, Sec. 8, Clause 3. 'It is established doctrine of this court that a state may not, *in any form or under any guise*, directly burden the prosecution of interstate business.' *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 112, 54 L. Ed. 678, 30 S. Ct. 481, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, and see *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. Ed. 719, 14 S. Ct. 829, 4 Inters. Com. Rep. 658; *Brown* v. *Houston*, 114 U. S. 622, 29 L. Ed. 257, 5 S. Ct. 1091; *Webber* v. *Virginia*, 103 U. S. 344, 351, 26 L. Ed. 565, 567; *Kansas S. R. Co.* v. *Kaw Valley Drainage Dist.*, 233 U. S. 75, 58 L. Ed. 857, 859, 34 S. Ct. 564."

A very little analysis will be required to show that the Growers Cost Guarantee Law and the statute involved in the Baldwin case operate in a closely similar manner. Let us assume for the sake of argument that the arbitrary price set by the commission is ten cents per box above the current market price. Who will pay this extra ten cents? Certainly not the people of Florida, for their traffic is only from back yard to kitchen. Then, if paid at all—if Florida citrus is bought at all—this extra price must be paid by the consumers in other states and other countries.

In the case under consideration, the state statute required the grower to sell for ten cents more than his product is worth. What is the difference between this and the New York statute in the above case which prohibited the buyer from selling in New York, unless he had paid a certain price for his commodity? Is it not to the same extent an impost or a duty? Is it not the equivalent of a state statute requiring a buyer in interstate commerce to pay a tax of ten cents per box on his purchases? (*Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 83 L. Ed. 276.)

In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, it was held that a state could not

impose any condition or regulation on the right of a foreign corporation to come into a state and buy commodities for interstate shipment.

In *Stafford* v. *Wallace*, 258 U. S. 495, 66 L. Ed. 735, this court held that the business done in the various stockyards of the country by commission men and livestock dealers, between the receipt of the livestock from the ranges and farms of the west, in the yards, and the shipment of them therefrom to consumers in the east, is a part of interstate commerce, or is so associated with it as to bring it within the power of federal regulation. It will be noted that the character of this business, taken separately, is entirely local; yet, its effect upon interstate commerce was found to be so direct that the regulatory power of the National Government was upheld.

The appellees in our case are engaged exclusively in preparing grapefruit for interstate commerce. Any regulation that affects them affects interstate commerce; and any restraint that restrains them must restrain interstate commerce. To say that an effect is direct on one is to say that it is direct as to the other. As was proved by appellees, the direct and immediate result of the statute was the closing of the plants of appellees, for to operate was to be confiscated. The direct and immediate result of the closing was necessarily to stop the flow of Florida canned citrus products in interstate commerce.

This court, in *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, held that interstate commerce consisting of buying grain in one state, practically all of which was intended for shipment to and sale at terminal markets in another state conformably to the general and usual course of business in the grain trade, was unconstitutionally controlled and burdened by the provisions of a statute of the first state under which such purchases could only be made by those who held licenses from the state, paid state charges for the same, and acted under a system of grading, inspecting and weighing, fully

defined in the act; moreover, the grain could only be purchased subject to the power of the state grain inspector to determine the margin of profit that the buyer should realize upon his purchase, which was defined to be the difference between the price paid at the elevator and the market price, with an allowance for freight, at the terminal points to which the grain was shipped and sold.

As stated by the court:

> "* * * the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. *That this is a regulation of interstate commerce is obvious from its mere statement.*"

In the late case of *Townsend* v. *Yeomans*, 301 U. S. 441, 81 L. Ed. 1210, this court affirmed the holding in the *Lemke Case, supra*, and in reference thereto, among other things, said

> "the grain could only be purchased subject to the power of the grain inspector to determine the margin of profit the buyer could realize upon his purchase * * * the state officer was thus authorized 'to fix and determine the price' to be paid for grain which was 'bought, shipped, and sold in interstate commerce.' "

Further in the Lemke case in discussing *Dahnke-Walker Mill Company* v. *Bondurant*, decided December 12, 1921, 257 U. S. 282, 66 L. Ed. 239, 42 Sup. Ct. Rep. 106, the court says:

> "Applying the principle of that decision and the previous decisions of this court, cited in the opinion, the complainant's course of dealing in the buying of grain which it purchased and sold under the circumstances as herein disclosed was interstate commerce. *Being such, the state could not regulate the business by a statute which has the effect to control and burden interstate commerce.*

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and federal authority under facts presented, which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here. *None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines* * * * The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276; *Eureka Pipe Line Co. v. Hallanan*, decided by this court December 12, 1921 (257 U. S. 265, 66 L. Ed. 227, 42 Sup. Ct. Rep. 101); and *United Fuel Gas Co. v. Hallanan*, decided the same day (257 U. S. 277, 66 L. Ed. 234, 42 Sup. Ct. Rep. 105).

"In view of this state of facts, we come to inquire whether the North Dakota statute is a regulation of interstate commerce, and, therefore, beyond the legislative power of the state."

After stating some of the essential provisions of the act, the court continues:

"Nor will it do to say that the state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 468, 59 L. Ed. 1406, 1411, 35 Sup. Ct. Rep. 896.

"It is contended that these regulations may stand upon the principles recognized in decisions of this

court which permit the state to make local laws under its police power, in the interest of the welfare of its people, which are valid, although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the states. *This principle has no application where the state passes beyond the exercise of its legitimate authority, and undertakes to regulate interstate commerce* by imposing undue burdens upon it. This court states the principle and its limitations in the discussion of the subject in the Minnesota Rate Cases (*Simpson* v. *Shepard*), 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. In the course of the opinion in that case, we said (p. 400):

> 'The principle which determines this classification (between federal and state power) underlies the doctrine that *the states cannot, under any guise, impose direct burdens upon interstate commerce.*'

"Applying the principle here, the statute denies the privilege of engaging in interstate commerce except to dealers licensed by state authority, and provides a system which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce."

That this language is applicable in the instant case cannot be doubted. For what could more directly burden interstate commerce than a statute of a state saying "People of the nation, when fruit is scarce, you must pay all the grower wants for it. But when fruit is over-plentiful, we shall declare an emergency and we will not allow him to sell to you at a price less than his cost of production." In effect, this is to say, "Consumer, you must pay for Florida grapefruit either *market price* or *cost of production, whichever is greater.*"

In the *Lemke Case, supra*, the statute said, "Buyer, you must *pay* not less than a certain price"—this was

held an undue interference with interstate commerce. But what is the difference if the statute says, as it does in this case, "*Seller*, we will not allow you to *sell*" at less than a stated arbitrary minimum? Is not the interference as direct on one side of the transaction as it is on the other? The appellees certainly think so. And what burden could weigh more heavily—what interference could be more complete—than that which causes all traffic in a commodity to cease.

Following the decision in *Lemke v. Farmers Grain Co., supra*, another statute was passed by the State of North Dakota, which came before the court in *Shafer v. Farmers Grain Company*, 268 U. S. 189, 69 L. Ed. 909. The court found that about ninety per cent (90%) of the business affected was interstate commerce; that the statute authorized broad supervisory control with the view of "preventing" various practices deemed "unjust" or "fraudulent," that

> "a state statute, which, by its necessary operation, directly interferes with or burdens such commerce, is a prohibited regulation and invalid, *regardless of the purpose with which it was enacted.*"

and this basis said:

> "We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause."

Not inconsistent is the case of *Highlands v. Agnew*, 81 L. Ed. 835, 300 U. S. 608, where a Virginia milk control bill was under consideration and the court held that it did not burden interstate commerce because it specifically applied only in Virginia. It will be noted that the

act specifically provided that none of its provisions "shall apply or be construed to apply to foreign or interstate commerce." The milk board had theretofore held that the plaintiff was not subject to the provisions of the act because he bought and sold milk in interstate commerce.

It cannot be too forcefully emphasized that the provisions of the statute in question are all negative. There is no regulation (in the real sense of the word), there is no correction of an evil, no attempt to simulate fairness by balancing against the rights and interests of the public, and of the packer, of the canner, and of the grower on the other hand. Volume of production, cost of labor, cost of processing, cost of marketing and distributing, volume of consumption, freight and express rates, climatic conditions, differences in soil condition and fertility, differentials in transportation rates of all kinds are completely ignored. One single price in this sizeable industry is set and no regard is had for market price, of any resale price, of consumer-value, or of any of the hundreds of other elements involved. Such a restraint cannot be otherwise than arbitrary and unreasonable.

In *Public Utility Commission* v. *Attleboro Steam & E. Company*, 273 U. S. 83, 71 L. Ed. 549, the court reasserted the principle that a state may not in any guise or in any manner directly burden or interfere with interstate commerce, even though the portion of the business devoted to interstate commerce is a relatively small percentage. In that case, 97% of the electricity generated by the Narragansett E. L. Company was consumed intrastate and less than 3% was delivered interstate to the Attleboro Company. Yet the power of the state to regulate this small portion was denied, even though the regulation might have "protected" to a certain extent the larger intrastate business.

It has been shown that nearly one-half of all grapefruit grown in Florida is canned and that over 99% of that canned goes into interstate or foreign commerce. Cer-

tainly, such a state of facts is well within the bounds of interstate commerce set in the above case, *Public Utility Commission* v. *Attleboro*, and the case of *National Labor Relations Board* v. *Fainblatt*, decided April 17th, 1939, 83 L. Ed., Advance Opinions, page 646. In the latter case the employer was actually not engaged in interstate commerce; yet, it was found that a strike or tie-up in his plant would have directly affected interstate commerce. On this basis, his employees were held subject to the National Labor Relations Act.

Appellants put much faith in *Townsend* v. *Yeomans*, 301 U. S. 441, 81 L. Ed. 1210, which involves a statute of Georgia fixing maximum prices for warehousemen to charge for the handling of tobacco. That case is not applicable for many reasons. It was pointed out in the opinion that the selling season is only from three to five weeks and the court found that the complainants "maintain and enjoy a virtual monopoly in the field covered by their operations" (page 448). In other words, the legislature was dealing with a monopoly which is not true in our case. It was also emphasized on two occasions in the opinion that the Georgia act did not attempt to fix prices (pages 455-459). Mr. Chief Justice Hughes intimated most strongly if the act had attempted to fix prices, it would have been unconstitutional.

The law seems to be well settled where a matter demands a general system or uniformity of regulation, Congress alone can so regulate but, if Congress has the power to enter that field and has not done so, the states may act within their respective jurisdictions until Congress sees fit to act *if the matter does not demand uniform regulation.*

Cooley v. *Port Wardens*, 12 How. 299, 13 L. Ed. 996.

Simpson v. *Shepard*, 230 U. S. 352, 57 L. Ed. 1511.

Sproles v. *Binford*, 286 U. S. 374, 76 L. Ed. 1167.

Just what matters demand uniform regulation have never been defined and a limited definition seems im-

possible. However, it does seem clear that the fixing of prices to be paid farmers and growers for their commodities which are sold throughout the United States is a matter that demands uniform regulation; otherwise, it is conceivable that the states might set varying prices to such an extent that interstate commerce would be tremendously burdened.

In *Santa Cruz Fruit Packing Company v. National Labor Relations Board*, 303 U. S. 453, 82 L. Ed. 954, this court had occasion to discuss the commerce clause in connection with the National Labor Relations Act. The record of the case showed about 37% of the cases packed by the petitioners were shipped into interstate or foreign commerce, 9.02% being sent to foreign countries and about 28% to various points in the United States. The court held that the fact that fruits and vegetables handled by a canning company were grown within the state and that the activities of such company are confined to the state does not, where a substantial percentage of its products are sold by it in interstate and foreign countries, render the National Labor Relations Act inapplicable.

As we understand this opinion, it in effect held that although only 37% of the finished product of the cannery went into interstate commerce that its business so affected interstate commerce that Congress alone could pass laws affecting the business. In the instant case, we show that 99% of the finished product goes into interstate commerce and, therefore, an interference by the state would be a material burden on interstate commerce.

IV. The Regulation Is Void Because No Full Hearing Was Had by the Commission.

The record shows that the appellees, as plaintiffs below, charge in their complaint that the cost of production was not properly determined by the Florida Citrus Commission and that said regulation constitutes a denial

of the property rights of these appellees without due process of law (R. 13).

The Growers Cost Guarantee Law provides that after certain prerequisites "The Florida Citrus Commission shall determine and record in permanent form annually the average reasonable cost per standard packed box of producing citrus fruit". (Appendix).

The regulation of the Florida Citrus Commission (Appendix) shows that the proclamation of the commissioner of agriculture of the State of Florida was dated January 13, 1939, and that petitions were filed with the commission requesting the commission to determine average reasonable cost of producing grapefruit, then states "hereby determines and records in permanent form the average reasonable cost per standard packed box of producing grapefruit to be 32 cents for the citrus season of 1938-1939." The regulation is dated January 16, 1939, which was three days after the proclamation by the commissioner of agriculture.

The chairman of the Florida Citrus Commission filed an affidavit at the hearing (R. 40-41-42) and says that, on January 16, declaration of the commissioner of agriculture was presented to the commission together with petitions and that on the same day the commission considered fixing of the cost of production, that "after considering all of the information available relating to the cost of production of grapefruit, which information included compilation of data supplied by the chief field agent for the commission and the Agricultural Extension Service of the University of Florida, the commission found, determined and ordered that the average reasonable cost per standard packed box of producing grapefruit was 32 cents" (R. 42).

The chief field agent filed his affidavit at the hearing (R. 43-44) in which he stated that he gathered and compiled information from growers and shippers of grapefruit and had consulted with the Department of Agricul-

tural Economics of the Agricultural Extension Service of the University of Florida and submitted to the citrus commission, on January 16, an estimated figure showing the average reasonable cost per standard packed box of grapefruit to be 32 cents.

The economist of the Agricultural Extension Service of the University of Florida, likewise, filed an affidavit (R. 44) stating that he had studied the cost of producing citrus fruits in Florida, that he made available to the commission all information that he had regarding cost of production of grapefruit; that his information was arrived at by taking cost of production upon a representative number of citrus growers and that the estimated cost of production for grapefruit for the 1938-1939 season was arrived at by using the cost of production for previous seasons, due regard being held for the costs per acre and the probable production per acre, stating "The costs for the current season would have to be estimated as no definite cost per box could be arrived at until the entire crop has been harvested and the production per acre ascertained" (R. 44).

The foregoing is all the testimony in the record as to the procedure of the Florida Citrus Commission to *determine* the cost of production.

It is respectfully submitted to the court that the statute and regulation are void under the Fourteenth Amendment to the Constitution of the United States because, first, the statute did not provide for a full hearing before the cost of production was *determined* and, second, the procedure by the Florida Citrus Commission did not constitute a hearing as required by the decisions of this court in interpreting the Fourteenth Amendment to the Constitution.

(a), Notice and Hearing Are Primary Requirements in the Administration of the Act for the Determination of the Reasonable Cost of Production of Citrus Fruit.

A cardinal principle of administrative law is that under the Fourteenth Amendment of the Constitution any

action taken concerning one's property and rights is invalid unless there first be provided a full and fair hearing.

"The processes employed by administrative tribunals differ from those in the courts and in many cases are more summary. But administrative proceedings in a court of justice must conform to the essentials of due process of law. Notice and opportunity to be heard are generally just as essential in one proceeding as in the other. Hence, a state law establishing a commission for licensing real-estate brokers, where it authorizes the commission to require and produce proof of honesty of each applicant, would be unconstitutional if interpreted to mean that the commission might procure such proof secretly, without giving the applicant notice or opportunity to learn its nature and source to meet it.

"In courts of law, notice and hearing precede the adjudication. In many administrative proceedings a similar principle is operative. But in the latter type of proceedings, because of the urgency of public need or because of practical considerations of administrative efficiency or effectiveness prior notice and hearing is not always feasible. In such cases due process is afforded if the person whose property is affected is thereafter given an opportunity to test the validity or propriety of the administrative action.

"Any course of procedure which has for its object the taking of property to satisfy an alleged legal obligation and which yet accords no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land can hardly be termed 'due process of law.' The hearing which must precede the taking of property is not a mere form; the owner must have the right to secure and present evidence; he must be given the opportunity by proof and argument to controvert the claim asserted against him before a tribunal bound not only to listen but to give legal effect to what has been established."

Constitution of the United States of America, revised and annotated 1938, pages 908 and 909.

The pertinent part of the act reads as follows:

> "The Florida Citrus Commission shall *determine* and record in permanent form annually the average reasonable cost per standard packed box of producing citrus fruit."

This section of the act, construed from the words therein alone, would be so indefinite and uncertain as to violate the due process clause of the Constitution.

Connally v. *General Construction Company*, 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322.

United States v. *Cohen Grocery Company*, 255 U. S. 81, 65 L. Ed. 516.

United States v. *Capital Traction Company*, 34 App. D. C. 592, 19 Am. Cas. 68.

Cline v. *Frink Dairy Company*, 274 U. S. 445, 71 L. Ed. 1146.

In *Connally* v. *General Construction Company, supra*, the court construed the statute of Oklahoma which put in force an eight-hour law and provided that construction on state work should pay "*not less than the current rate of per diem wages in the locality where the work is performed.*"

The court cites a number of precedents, including the case of *United States* v. *Cohen Grocery Company*, 255 U. S. 81, 92, 41 S. Ct. 298, 301, 65 L. Ed. 516, 14 A. L. R. 1045, involving a statute which imposed a penalty for making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The court held that these words fixed no ascertainable standard of guilt.

The court cited the case of *U. S.* v. *Capital Traction Co.*, 34 App. D. C. 592, 19 Am. Cas. 68, in which a statute made it an offense for any streetcar company to run an insufficient number of cars to accommodate the passengers "without crowding," was held void for uncertainty.

(b) The Word "Determine" Means to Ascertain Definitely As the Result of an Investigation.

The word "determine" has been variously defined as meaning:

> "To adjudge; to ascertain definitely; to ascertain or state definitely; to come to a decision; to decide upon, as after consideration or investigation; to decree; to find out or ascertain the truth about the occurrence; to fix or settle definitely; to make specific or certain; to perform a judicial act; to put an end to; to set down authoritatively; to settle by authoritative or judicial sentence."
>
> 18 Corpus Juris 984.

> "To put or set an end to; to bring to a close; to terminate; to fix conclusively or authoritatively; to settle a question or controversy about; to decide by authoritative or judicial sentence; to come to a decision concerning as the result of an investigation."
>
> Webster's New International Dictionary, 1938 Edition.

In *Hillsborough County* v. *Henderson*, (Fla.) 33 So. 997, the question before the court turned upon the construction of a resolution for the issuance of bonds "bearing interest at a rate of not more than 4% per annum." The court said, page 997:

> "Is the provision that the interest shall not exceed a certain rate a compliance with the requirement that the rate shall be *determined*? 'To determine' is defined as meaning 'to ascertain definitely' or 'to settle,' and it is in this sense that the word is used in the statute. A provision which leaves for future determination the precise rate of the interest to be paid, merely limiting the range of the discretion to be exercised by those who shall ultimately fix it, cannot be said to determine the rate."

In *State* v. *Board of Education of City of Columbus*, 35 Ohio St. 368, the court had before it the construction of a statute of Ohio which provided that "each board of education shall determine the studies to be pur-

sued, and the textbooks to be used in the schools under their control, *and no textbooks shall be changed within three years after its adoption, without the consent of three-fourths of the members of the board of education given at a regular meeting.* The court said:

> "Under this, the board is to *determine* the textbooks to be used. What is the meaning of the word 'determine,' as here used, or what operation and effect ought to be given to it? When taken in connection with the purposes of the law, * * * and the subject matter to which it relates. * * * it is manifest that the word *'determine' must mean something more than investigation and arriving at a conclusion by mental processes,* although these are embraced. Official action is contemplated and required to give a practical effect to the word, and the injunction to do this mandatory upon the board; and in order that those who must obey may know the will of the board, it is necessary that it should be declared in such a way that it may be known."

In *Trust Company of America* v. *Safe Deposit Company*, 109 App. Div. 665; 96 N. Y. 585, 588, the court said that the certificate of a physician, authorizing a transfer to be made whenever the physician of either of the state prison reformatories or penitentiaries shall certify to the warden or superintendent thereof that a male prisoner confined therein for a felony is, in his opinion, insane, is not a "determination of incompetency" within either the spirit or letter of a statute (Code, Civ. Proc., Tit. 6, Ch. 7) relating to proceedings for the appointment of a committee of an incompetent.

The Georgia case of *Smith* v. *Board of Education of Walton County*, 164 S. E. 41, 43, involved the determination by the county commissioners of whether the majority of the registered qualified voters voted to consolidate school districts, and on page 43 the court said:

> "This brings us to consider and construe the language in said section that 'the result of such elec-

tion shall be *determined* and declared by the board of education.' Under this law two or more school districts can be consolidated only by a majority of the qualified voters of the district voting for consolidation. How is this to be determined? The statute expressly declares that it is to be *determined* by the board of education. The duty is put upon the county board of education to *determine* whether a majority of the qualified voters of the districts voted in favor of consolidation at such election. *This does not mean that the county board of education is simply to examine the returns of the election, count the number of votes cast for consolidation, and declare from the face of the returns whether a majority voted for consolidation or not.* This would put too narrow a construction upon this language of this section. To *determine* has been defined to mean to adjudge, to come to a decision, *to decide upon after investigation, to ascertain the truth about a transaction, to perform a judicial act, to settle by judicial sentence, and to try and put an end to it. Irvin* v. *State*, 9 Ga. App. 865, 868, 72 S. E. 440; 18 C. J. 984. So we are of the opinion that the board of education had authority, upon issue made, to determine whether a majority of the qualified voters of these districts had voted for consolidation, notwithstanding the fact that the returns of the election showed a different result."

See, also, *United States* v. *B. & O. R. Co.*, 293 U. S., pages 454, 462, *et seq.*, 79 L. Ed. 587, which involved the power of the Interstate Commerce Commission to require installation on locomotives of power reverse gear. Beginning on the last-mentioned page, the court said:

"Third. The railroads contend that to support the order *certain basic findings are essential; that these were not made; and that, hence, the order is void. This contention is in our opinion sound.* This act does not confer upon the commission legislative authority to require the adoption on locomotives of such devices as, in its discretion, it may from time to time deem desirable. The operation of an engine, however equipped, involved 'danger of life or limb'

> * * * The report discusses, at some length, the alleged advantages and disadvantages of the two classes of reverse gear and the expense which the proposed change would entail; and concludes with 'finding' that, to a certain extent, the change should be made. But whether the use of any or all types of steam locomotives 'equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life or limb,' *is left entirely to inference. This complete absence of 'the basic or essential findings required to support the commission's order,' render it void.*"

In order to *determine* the facts, as in this case in order to determine the reasonable cost of production it is necessary for the commission to obtain the facts. Without the facts, it can determine nothing. In order to determine the facts, it is necessary that it have a hearing, where evidence may be presented pro and con upon which and arising out of which the commission shall fix or determine what the reasonable cost of production is. This is necessarily so in this particular case for the reason that the commission was directed to ascertain and *determine* the reasonable cost. A one-sided investigation is not sufficient.

"While hearings before administrative bodies need not have all of the formality of judicial procedure but may be informal and, if suited to the matter involved, rather summary, yet there are certain elements of fair play required by the Constitution which are necessary in any character of hearing affecting personal or property rights. In respect to hearings before administrative bodies (as well as judicial tribunals) those elements include (1) a reasonable time and place for hearing where interested parties may attend with reasonable effort; (2) reasonable notice to interested parties; (3) a reasonable opportunity for presentation of such evidence and argument as are appropriate to the proceeding" (citations omitted). *Chamber of Commerce* v. *Federal Trade Commission*, (C. C. A. 8, 1926) 13 F. (2d) 673.

The words "average reasonable" are indefinite and uncertain. The Florida Citrus Commission by a regulation, therefore, could not fix or determine an uncertain thing. What might be reasonable in one section of the State of Florida might seem unreasonable in another and to fix or determine the average reasonable cost for the entire State of Florida of an uncertain thing, the commission must procure the facts from evidence after a hearing.

The reasonable cost of production to the grower in this case may be likened to a reasonable rate to be charged by a common carrier; it must be based upon many circumstances.

In *Scharff-Kohen Mfg. Co.* v. *Atchison, T. & S. Ry. Co.*, 151 I. C. C. 270, the Interstate Commerce Commission holds that the reasonableness of rates is not a matter of mathematical computation or formula, but is one which necessitates consideration of the various elements of rate making.

The Supreme Court of the United States in *Smyth* v. *Ames*, 171 U. S. 361, 43 L. Ed. 197, holds that the reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put such rates into operation.

In *Illinois Central R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 455, 51 L. Ed. 1128, 1134, the court says:

> "The question is one of reasonableness of a rate, and such question was said to be one of fact in *T. & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935."

In *T. & P. R. Co.* v. *I. C. C.*, 162 U. S. 197, 40 L. Ed. 940, 954, the court, speaking through Mr. Justice Shiras, says:

> "The question whether certain charges were reasonable or otherwise, whether certain discrimina-

tions were due or undue, were questions of fact, to be passed upon by the commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the circuit court of appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was."

To the same effect is *C., N. O. & T. P. R. Co.* v. *I. C. C.*, 162 U. S. 184, 40 L. Ed. 935.

From what has been said above, the following conclusions must be reached:

(1) That determination means finding of fact.

(2) Fact finding presupposes evidence.

Procedure is not regulation but embraces pleading, evidence and practice. In other words, notice, hearing, evidence produced and finding of fact are all essential to making a determination.

The regulation of the citrus commission violates all rules of administrative law and it clearly appears in this case that there has been no hearing after due notice with introduction of evidence and argument and, therefore, the regulation violates the due process of law of the Fourteenth Amendment to the Constitution.

A hearing, under this statute, cannot be had by this court or any other court. The duty of determining the reasonable cost was delegated to the commission and there is no provision in the statute for a review by the courts or by any other procedure. The duty is not delegated to the court and if the "average reasonable cost" has not been determined by the commission in accordance with due process of law, the regulation is void and unenforceable.

(c) Even a Hearing Granted As a Matter of Favor Is Not a Substantial Substitute for Due Process of Law.

Assuming, solely for the sake of argument, that the procedure of the Florida Citrus Commission in determin-

ing cost of production amounted to a hearing, it does not cure the fatal constitutional objection to the statute. The courts have universally held that a hearing is a matter of right and not a matter of favor.

In *Security Trust & S. B. Co.* v. *Lexington*, 203 U. S. 323, 333, the court by Mr. Justice Peckham, said, with respect to an assessment for back taxes:

> "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, *but the question is whether any notice is provided for by the statute.*"

In *Central of Ga. R. Co.* v. *Wright*, 207 U. S. 127, 138, 52 L. Ed. 134, the court said:

> "This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace."

In *Roller* v. *Holly*, 176 U. S. 398, 409, 44 L. Ed. 520, the court declared:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

In *Louisville & N. R. Co.* v. *Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, the court said:

> "The law itself must save the parties' rights and not leave them to the discretion of the courts as such."

In *Henry L. Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027, the court said:

> "Nor can extraofficial or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the constitution requires."

(d) What Constitutes a Quasi Judicial Determination?

In McGehee on Due Process of Law, pages 370, 371, regarding notice and hearing, it is said:

> "When a regular rule or standard for the regulation of conduct or property has been framed, the application of the regulation to the circumstances of the individual involves a *judicial question* requiring the presence of that notice and hearing which in such circumstances is necessary to constitute due process of law."

Various courts have thus defined and characterized what they term "*quasi* judicial" functions or matters. Thus in *Bair* v. *Struck*, 74 Pac. 69, 71 (Mont.), the court quotes from certain standard authors to the following effect:

> "But, if the contention of the appellant be sustained, the distinction between ministerial and *quasi* judicial acts is practically abolished. As distinguishing between acts *quasi* and acts ministerial in their character, the following definitions, we think correctly state the law:
>
> > 'Quasi judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi* judicial.' Meehan on Public Officers, Sec. 637; Bishop on Non-Contract Laws, Secs. 785, 786. 'Where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, the expression used is generally "*quasi* judicial" * * * The officer may not in strictness be a judge; still, if his powers are discretionary, to be exerted

> or withheld according to his own view of what is necessary and proper, they are in nature judicial.' Throop on Public Officers, Sec. 534."

See for similar definitions the words "*quasi* judicial" as defined in Words and Phrases, as well as the following authorities:

Oakman v. *City of Eveleth*, 203 N. W. 514, 517, 163 Minn. 100 (Minn.).

In re Courthouse of Okmulgee County, 161 Pac. 200, 201, 58 Okla. 683 (Okla.).

State v. *Ross*, 228 Pac. 636, 31 Wyo. 500 (Wyo.).

People ex rel. Schau v. *McWilliams*, 77 N. E. 785, 789, 185 N. Y. 92 (N. Y.).

The decisions of the United States Supreme Court have also frequently given a similar definition to what they term "*quasi* judicial" matters, in holding that notice and a hearing under the Fourteenth Amendment to the Constitution must accompany the determination of such matters by public administrative officers. For example, in the case of *Morgan* v. *United States*, 298 U. S. 468, 480, 80 L. Ed. 1288, there was involved the legality of the action of the Secretary of Agriculture in fixing the maximum rates to be charged by market agencies for buying and selling livestock. The court says to "determine," as a condition of his action, that the existing rates are or will be "unjust, unreasonable, or discriminatory," and if and when he so finds, he may "determine and prescribe" what shall be the just and reasonable rate, or the maximum or minimum rate to be charged, the court then adds:

> "That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. *There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact.*"

The court then, on page 480, thus characterizes the kind of matter such determination involves:

"A proceedings of this sort requiring *the taking and weighing of evidence, determination of fact based upon the consideration of the evidence*, and the making of an order supported by such findings *has a quality resembling that of a judicial proceeding.* Hence, it is frequently described as a proceeding of a *quasi* judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusions uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. *If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.*"

In the second decision of the case of *Morgan* v. *United States*, reported in 304 U. S. page 1, 82 L. Ed. 1129, this court in discussing the sufficiency of the hearing given by the Secretary of Agriculture in fixing the minimum rates to be charged by marketing agencies said:

"The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principle that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a *quasi* judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' * * * essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.

> Such a hearing has been described as an 'inexorable safeguard.' *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73, 80 L. Ed. 1033, 1052, 56 S. Ct. 720; *Ohio Bell Teleph. Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1101, 1102, 57 S. Ct. 724; *Railroad Commission* v. *Pacific Gas & E. Co.*, 302 U. S. 388, 393, *ante*, 319, 58 S. Ct. 334, 82 L. Ed. 319; *Morgan* v. *United States*, 298 U. S. 468, 80 L. Ed. 1288, 56 S. Ct. 906, *supra*. And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a 'full hearing.'"

The same characterization of the determination of such questions is found in the leading case of *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, 91, 57 L. Ed. 431.

In *Southern Ry. Co.* v. *Virginia ex rel. Shirley*, 290 U. S. 190, 194, 78 L. Ed. 260, the court held that a statute of Virginia, as construed by the highest court of that state, was invalid because it did not require a hearing before making a determination and said:

> "Undoubtedly, it attempts to give an administrative officer power to make final determination in respect of facts * * * the character of a crossing and what is necessary for the public safety and convenience * * * without notice, without hearing, without evidence; and upon this *ex parte* finding, not subject to general review, to ordain that expenditures shall be made for erecting a new structure. The thing so authorized is no mere police regulation."

Again on page 197 of the opinion, we find:

> "Counsel submit that the legislature without giving notice or opportunity to be heard, by direct order might have required elimination of the crossing. Consequently, they conclude the same may be accomplished in any manner which it deems advisable without violating the Federal Constitution. *But we*

assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, *it by no means follows that an administrative officer may be empowered without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence.* In *theory*, at least, the legislature acts upon *adequate knowledge after full consideration* and through members who represent the entire public.

"Chapter 62 undertakes to empower the highway commissioner to take railway property if and when he deems it necessary for public safety and convenience. It makes no provision for a hearing, and grants no opportunity for a review in any court. This, we think, amounts to the delegation of purely arbitrary and unconstitutional power unless the indefinite right of resort to a court of equity referred to by the court below affords adequate protection."

Another recent decision wherein the court held that the Constitution itself required a notice and hearing, even though the statute under which the action was taken did not do so, is *Boeing Air Transport* v. *Farley*, 75 F. (2d) 765, 767, decided by the United States Court of Appeals for the District of Columbia. This was a suit to restrain the Postmaster General from enforcing an order which annulled certain air mail contracts. The government contended that notice and hearing preliminary to terminating the contracts was not required by the statute under which they were terminated and were not essential, but on this point the court said, on page 767:

"Plaintiffs, however, contend that it is elemental law that any attempt to deprive a person of his property without first according to him notice and hearing is void, in that it violates the Fourteenth Amendment to the Constitution of the United States, providing that 'no person shall be * * * deprived of life, liberty, or property, without due process of law.'

On the other hand, counsel for the government contend that notice and hearing, by the terms of the statute, are not essential to the issuance of a valid order of annulment by the Postmaster General. Section 3950, *supra*, does not expressly provide for notice and hearing as a condition precedent to the annulment of a mail contract; *but we are of the opinion that a provision for notice and hearing may, by implication, be read into the statute, for otherwise it would be clearly unconstitutional. Southern Ry. Co. v. Virginia*, 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260."

Particular attention is called to the case of *Ohio Bell Telephone Co.* v. *Public Utilities Com.*, 301 U. S. 292, 81 L. Ed. 1093. This case involved the legality of the procedure of the State Public Utilities Commission of Ohio in fixing the value of the telephone company's property for rate-fixing purposes and said

> "*There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay*, when that minimum requirement (of a full hearing) has been neglected or ignored."

(e) A Full Hearing Requires Evidence Adequate to Support Pertinent Necessary Findings of Fact.

Morgan v. *United States*, 298 U. S. 468, 80 L. Ed. 1288.

Same Case, 304 U. S. 1.

In the first *Morgan Case*, in 298 U. S. 468, the court said:

> "Congress has required the secretary to *determine* as a condition of his action, that the existing rates are or will be 'unjust, unreasonable or discriminatory.' If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the minimum or the maximum rate, thereafter to be charged. *That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural require-*

*ments. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. * * *. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based upon the evidence must embrace the basic facts which are needed to sustain the order.*

"A proceedings of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding."

In the second Morgan case the facts were as follows: This case involved the maximum rates to be charged by the Secretary of Agriculture. In that case a hearing was had. The findings however, were made by the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the government, and were submitted to the secretary who signed them, with a few changes in the rates, when his order was made on June 14, 1933. These findings, 180 in number, were elaborate. No opportunity was afforded Morgan for examination of the findings thus prepared in the Bureau of Animal Industry until appellants were served with the order. He sought a rehearing before the secretary but without avail. The secretary did not examine all of the evidence. He had several conferences with the solicitor of the department and with the officials in the Bureau of Animal Industry and discussed the proposed findings. The substance of his action is stated in his answer to the question whether the order represented his independent conclusion:

"My independent conclusion was based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of men in the Bureau of Animal Industry."

The Supreme Court says, page 18, "save for certain rate alterations he 'accepted the findings.'" The court says that the secretary read the summary presented by appellant's briefs and he conferred with his subordinates who had sifted and analyzed the evidence, and the court said it assumed that the secretary sufficiently understood its purport. On this question the court says:

> "But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command. No such reasonable opportunity was accorded appellants."

Further on the court says:

> "If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as the beginning and intermediate steps."

We call the court's attention particularly to the facts in that case because they are almost identical with our case; in other words, in that case the secretary states that his conclusions were based upon the findings of men working for him. That is exactly what happened

in this case. That case is even stronger than ours because in here the citrus commission did not even make independent findings but merely adopted the opinion of the chief field agent (R. 41).

See, also, *Southern Ry. Co. v. Virginia, supra.*

In *Chicago, M. & St. P. R. R. Co. v. Minnesota,* 134 U. S. 418, 33 L. Ed. 970, the court in holding invalid an act permitting the state commission to make rates without notice, said:

> "It deprives the company of its right to a judicial investigation, by due process of law—no hearing is provided for, no summons, or notice to the company before the commission has found what it is to find and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

In *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, in passing upon the claim made by the Interstate Commerce Commission of its power to base its *determination* as to rates on its opinion, whether supported by facts or not, the court said:

> "A finding without evidence is arbitrary and baseless. And if the government contention is correct, it would mean that the commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however, beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power. In the comparatively few cases in which such questions have arisen, it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if

that granted was inadequate or manifestly unfair, if the finding was contrary to the 'indisputable character of the evidence.'"

In the case of *Omaha* v. *Omaha Co.*, 218 U. S. 180, 54 L. Ed. 991, the same doctrine is laid down.

St. Joseph Stock Yards v. *U. S.*, ~~296~~ 298 U. S. 38, 80 L. Ed. 1033.

Ohio Bell Tel. Co. v. *Pub. Util. Com.*, 301 U. S. 292, 81 L. Ed. 1093.

R. R. Comm. of Cal. v. *Pac. Gas & Elec. Co.*, 302 U. S. 388, 82 L. Ed. 319.

Chicago Junction Case, 264 U. S. 258, 265, 304, 68 L. Ed. 667.

Binkerhoff v. *Hull*, 271 U. S. 683, 70 L. Ed. 1150.

Norwegian v. *U. S.*, 288 U. S. 294, 77 L. Ed. 796.

It was the duty of the commission to hold hearings, receive evidence, and determine facts upon evidence and the fact that it did not take sufficient time cannot excuse the want of a full and fair hearing.

This question has been expressly decided, February 27, 1938, in *Western Union Telegraph Co.* v. *Industrial Commission of Minnesota*, 24 Fed. Supp. 370. That case involved the sufficiency of a hearing granted by the Minnesota Industrial Commission before putting into effect its order establishing minimum wages of women and minors employed in industries in that state. It appears that the commission about June, 1937, appointed an advisory board, so-called, consisting of eleven members. This advisory board, having made a study and investigation, *but without holding public hearings*, made its report and recommendation to the commission. The commission, after giving published notice, held a hearing on April 11, 1938, with respect to minimum wages for women and minors of ordinary ability and for learners and apprentices, at which it appears that employers, employees and other interested persons presented themselves and made *statements* as to wages, profits and

other pertinent matters. At this hearing, *no evidence* by or on behalf of the commission was introduced; the factual or evidentiary basis for the order which the advisory board recommended and which the commission proposed to make, was not disclosed; and no witnesses were permitted to be sworn or examined, and no documentary evidence was introduced. Those present who desired to be heard were limited by the chairman of the commission to brief statements of the reason why they were opposed or in favor of the proposed order fixing minimum wages. *The lack of time of the commission to hear at length from all interested parties was stressed by the chairman.*

The court considered most of the recent authorities discussed in this brief, including the *Morgan Case, supra,* and the *Ohio Bell Tel. Co. Case, supra,* and held that the orders of the commission were invalid under the statute. The court said, page 377:

> "To determine what constitutes a minimum living wage for women and minors employed in Minnesota under the standards fixed by the Minimum Wage Law of the State of Minnesota would seem to call for something more than mere administrative or executive action. It would seem to require the gathering and weighing of evidence and the exercise of judgment in determining important, difficult and controversial questions of fact. Unless the action of the commission in this regard is executive merely its procedure must include a full hearing, and there must be evidence. *Morgan* v. *United States,* 298 U. S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288."

In *Ohio Bell Tel. Co.* v. *Public Util. Com., supra,* the court, speaking through Mr. Justice Cardozo, at page 305, says:

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

For other representative cases on this point, see:

Oertel v. *Glenn*, 13 Fed. Sup. 651

United States v. *Cohen Gro. Co.*, 255 U. S. 81, 65 L. Ed. 516.

Connally v. *General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322.

Small v. *American Sugar Refining Co.*, 267 U. S. 233, 69 L. Ed. 589.

Therefore, the statute in failing to provide for public hearing does violate the Fourteenth Amendment of the Constitution of the United States and if the court, in an attempt to hold the act constitutional, should write into the act a provision for the hearing then we have shown to the court that there was no hearing by the Florida Citrus Commission and that the regulation is therefore void and unenforceable.

V. The Citrus Commission Illegally Attempted to Put the Statute into Effect in That It Failed to Procure Binding Agreements from Producers, Shippers and Handlers Not Subject to the Provisions of the Act.

The Growers Cost Guarantee Law provides "after the citrus commission shall have procured from the producers, shippers, or handlers of citrus fruit, not subject to the provisions of this act, binding agreements to conform thereto and abide by its terms" the commission shall determine the cost of production (R. 19).

The opinion of the three-judge court refers to this provision of the act and says "failure to comply with it may not render it violative of the Constitution but certainly requires enjoining the commissioner from enforcing the fixed price" (R. 80).

Having acquired jurisdiction, the court had power to decide all questions involved even though not constitutional questions. *Fisher* v. *Brubaker, supra; L. & N.* v. *Garrett, supra;* and *Sterling* v. *Constantin, supra.*

It is admitted, by the regulation, that the citrus commission did not comply with said provision of the statute where it states:

> "Whereas, the Florida Citrus Commission has determined that all *citrus fruit dealers* handling grapefruit now being grown in the State of Florida are subject to the provisions of said act" (R. 31).

The legislature said that there were *producers, shippers,* and *handlers* not subject to the act. The commission *determined,* without any hearing or notice, that *dealers* were not subject to the act and, therefore, it did not attempt to get any agreements from *producers, shippers,* or *handlers.* We are reminded of the expression in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 67 L. Ed. 322, text 326, "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than a constitutional way of paying for the change." Clearly, the citrus commission did not determine that there were *producers, shippers,* or *handlers* not subject to the act but determined that it was too much trouble and would take too much time to comply with the act. The provision was put into the statute by the legislature so that if the statute were to be put into effect it would affect all alike; those not subject to the provisions of the act would be subject to agreements theretofore executed by them so that all would be affected alike. The commissioner of agriculture interpreted the act not to apply to grower-owned canneries or to co-operative canneries but the citrus commission had failed to get any binding agreements from these canneries. The only producers, shippers or handlers of the citrus commission subject to the act are those who deal directly with the grower; those who purchase the fruit on the tree from the grower; all others are not subject to the act.

Assuming, for the sake of argument, that the commissioner was correct in his interpretation that the act did not apply to a cannery which owned its own groves, then those dealing with such cannery for the purchase of the canned product would not be subject to the act. Yet, the commission did not have those dealers sign the agreement as provided by the statute.

In short, the commission took it upon itself to tell the legislature that it was in error in saying that there were any handlers of fruit not subject to the act. It assumed jurisdiction to make a determination of a fact without any authority whatsoever. The legislature provided that the Florida Citrus Commission should determine the cost price when and only when it had procured the agreements from the *producers, shippers* or *handlers* not subject to the provisions of the act.

The importance of the provision is emphasized in Section 4 of the Act which provides that the provisions thereof shall apply to any one or more of the citrus varieties "as may be determined by the petitions and *agreements* provided for in the foregoing section" (R. 20).

Without agreements, then how could the citrus commission say that the act should apply only to grapefruit? Suppose those not subject to the provisions of the act were unwilling to sign an agreement to abide by the statute in connection with the sale of grapefruit alone, could the commission have overridden the enactments of the legislature and put the law into effect as to grapefruit alone? Of course, the answer is, obviously, *no* and without any agreements determining which variety or varieties should be subject to the act the commission was powerless to say that the act would apply to one variety only.

If the commission can disregard the requirements of the act as to obtaining agreements, it could just as reasonably disregard the requirement that there must first be a declaration by the commissioner of the existence

of a state emergency. One provision is just as important and necessary as the other.

It is respectfully submitted to the court that the three-judge court was correct in holding that the act could not be enforced because the commission had failed to comply with the important conditions precedent.

Appellants argue that the provision under discussion was merely directory and cite as authority *Apgar* v. *Wilkinson,* 116 So. 78, 95 Fla. [illegible]. That case is not applicable to the situation that we have. In the first place, the Supreme Court of Florida in the Apgar case was considering a special act of the legislature where the words "authorized and required" were involved. To hold that these words were mandatory would make the act violative of the state constitution. Considering the act in its entirety, the court reached the opinion that these words "constituted an authorization or clothing of the said county commissioners with power and authority to do the things enumerated in the act." The court further said "we understand the general rule to be that, where mandatory words or provisions are written in the statutes defining the duties of administrative officers, such words or provisions may be construed as directory only, unless something in the body of the act is indicative of the contrary view." If that statement is a correct statement of the law, then the application of the same to the statute involved in this case results in the necessary conclusion that the provision is absolutely mandatory.

Suffice it to say that the following section in the act says that the variety of the citrus shall be determined by the *petitions* and *agreements.* It was very essential that agreements be obtained in order to determine what variety or varieties were to come under the provisions of the act.

Appellants further say that the provisions could be given no sensible effect, therefore, it should be entirely disregarded. Competitors of the appellees were not sub-

ject to the act; that is, co-operative canners, who were canning thousands of cases and not providing for the grower to receive 32 cents a box. These were handlers not subject to the act and agreements should have been obtained from them by the commission. Some growers were canning their grapefruit and selling the finished product at a price which did not net to the grower 32 cents per field box on the tree. The commissioner of agriculture construed the act to mean that it did not apply to these handlers. Not only were the appellees suffering from competition of canners in other states, who were not subject to the act, but they were suffering from competition at their own back doors by co-operative and grower-owned canneries which were not subject to the act. This condition was brought about by the failure of the Florida Citrus Commission to comply with the provisions of the statute.

The statute provides that "*after the citrus commission shall have procured*" and appellants claim that this is only directory but it must be borne in mind that a provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory. *Board of Education* v. *State*, 131 So. 239, 222 Ala. 70; *Stevens* v. *Tillamook County*, 273 Pac. 716, 128 Ore. 339; 59 C. J. 1074. Such provisions are also mandatory when they are antecedent and prerequisite conditions which must exist prior to the exercise of power. *Spencer's Appeal*, 61 Atl. 1010, 78 Conn. 301; 59 C. J. 1074; *State* v. *Farney*, 54 N. W. 862, 36 Neb. 537; *Spruill* v. *Davenport*, 100 S. E. 527, 178 N. C. 364; 59 C. J. 1075. It has also been held that statutes which clothe a public body or officer with power to perform acts which concern the public interests are mandatory.

The Supreme Court of Florida in *Seaboard Air Line* v. *Wells*, 130 So. 587, in construing a statute using the word "*may*" in designating the matters to be taken into consideration by the railroad commission upon an application, said:

> "Where a statute says that a thing 'may' be done by a public official, or official body, which is for the public benefit, it is generally to be construed to mean that it must be done" (citing several other cases).

It is contended in the complaint that the commissioner also failed to obtain petitions signed by persons, firms, corporations, or associations owning or controlling 50% or more of the producing acreage of citrus fruit. However, we must admit that the only evidence now before the court tends to show that the commission did comply with that provision and, as far as this appeal is concerned, appellees will waive that point.

VI. The Appellant Commissioner of Agriculture Is Without Authority to Revoke the Licenses of the Appellees Because of Their Failure to Comply with the Growers Cost Guarantee Law.

It is alleged in the complaint and admitted by respondent that the commissioner of agriculture had warned the plaintiffs that their licenses would be revoked if they operated canning plants and did not pay the producer at least 32 cents per field box (R. 32).

The commissioner of agriculture contends that he has this authority under the statute of Florida known as the Bond and License Act (R. 20) which provides for the licensing of citrus fruit dealers and also provides for suspension and revocation of the license of any dealer

who violates the provisions of said act or "if he violates any provision of any other law of the State of Florida governing and applicable to citrus fruit dealers" (R. 27). Just what was meant by the legislature by this provision is difficult to determine. The Bond and License Act was passed in 1935 and the Growers Cost Guarantee Law was passed at the same session of the legislature but subsequent to the Bond and License Act. Would the act mean any other laws then in existence or that may thereafter be enacted? Since it is purely statutory and since the legislature could not have had in mind any laws that it might thereafter pass, it must of necessity have referred to laws then in existence. The Growers Cost Guarantee Law provides no penalties whatsoever for violations thereof but merely creates a liability on the purchaser of citrus fruit to the grower of an amount equal to 32 cents per field box for the grapefruit. It is a law within itself and only to take effect under certain conditions therein named.

The Bond and License Act provides for the posting of a bond by the dealers conditioned upon compliance with the act and faithful compliance with conditions of all contracts made with producers. If the Growers Cost Guarantee Law is valid, the grower has recourse under the provisions thereof against the dealers, or in our case the canners, who do not pay him the full 32 cents per field box, and the bond is up to protect him.

The commissioner of agriculture is thereof without authority to revoke the licenses of the plaintiffs or either of them for their failure to comply with the Growers Cost Guarantee Law.

VII. The Statute Is So Vague, Indefinite and Ambiguous That It Is Unenforceable.

To argue this point at this place in the brief would unduly burden the court with repetitions of our arguments that were heretofore made in this brief. The mere reading of the statute shows that it is so indefinite and ambiguous that it is unenforceable. The Florida Citrus Commission recognizes this fact in their resolution when it admitted that it is unable to comply with the provisions thereof because it could not find any dealers who were not subject to the act as it was required to do by the act.

The statute states that any contract, plan, scheme or device, whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this state, but in all other respects and particulars contracts of sale, marketing and processing "shall be valid and binding and the terms thereof shall measure the rights of the respective parties. In one breath, it says any such contract shall be unlawful and against public policy but, in the next breath, it says that in all other respects, the contracts shall be valid. What this means is beyond our apprehension.

The statute further provides that petitions must be signed by persons, firms, corporations or associations owning or *controlling* 50% or more of the producing acreage. Certainly, the word "*controlling*" has no definite meaning. It is sometimes said that a mortgagee controls a business that is heavily mortgaged to him. With the citrus groves of Florida heavily mortgaged, did the legislature mean that the citrus commission should have the petitions signed by the mortgagees? For years, fruit dealers

in Florida have made arrangements with grove owners to sell their fruit for them on commission basis. In that case, who controls the acreage; the owner or the broker? Which one should sign the petition? In the obtaining of fertilizer, the grove owners find it necessary to mortgage their crops to the numerous fertilizer companies in Florida. They cannot sell without the agreement of the holder of a chattel mortgage. In such a case, who controls the acreage? Many of the owners of Florida citrus groves live in the north and have caretakers in the groves in full control of the grove. The caretaker has no authority to sell without the permission of the owner. In that instance, who controls the groves? We could go on indefinitely pointing out factual situations which tend to clearly confuse any attempt to define the word *control*. The act is so ambiguous that it is unenforceable.

G. CONCLUSION.

The court will recognize that there have never been any similar statutes attempted and, therefore, no cases directly in point and it has been necessary to cover a wide field in urging to the court the announcements which have been made in other cases and which we believe set forth principles that should control the decision in this case. It was once said "There is nothing new under the sun." The author of that statement never saw the Growers Cost Guarantee Law.

It is respectfully submitted to this court:

(a) The lower court had jurisdiction of the parties and of the subject matter.

(b) Grave federal questions were involved, and the court, therefore, could determine any other questions in the case.

(c) That the plaintiffs, representing by far the majority in volume of the canning industry of the State of Florida, have shown urgent need for injunctive relief.

(d) The three-judge court did not abuse its discretion in issuing the interlocutory injunction to protect the appellees, until further order of the court.

The order of the court issuing the temporary injunction which is the only order before this court should be affirmed.

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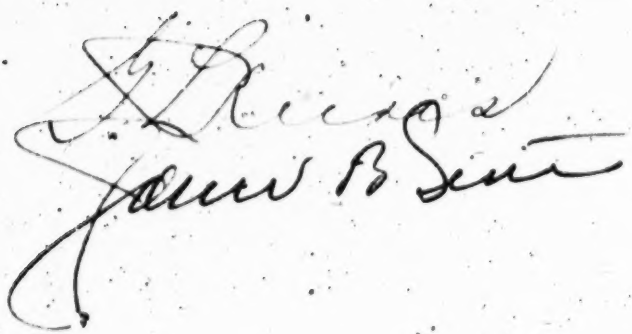

IN UNITED STATES DISTRICT COURT.

Opinion—Filed May 3, 1939.

This case was argued and submitted on April 10th, 1939, on the bill and testimony.

The defendants appeared and though they had not filed answers, argued the case and requested the Court to pass on all questions presented, and especially on the constitutionality of the Act involved.

The Act is found in Florida Acts of 1935, page 268.

Grower's Cost Guarantee Law.

An Act relating to citrus fruit: Prescribing conditions and limitations upon the sale, marketing and processing thereof, and the effect of contracts of sale and of marketing and processing agreements.

Whereas, it is found by the Legislature and hereby declared that the production and distribution of citrus fruit is a paramount industry in Florida upon which the prosperity of the State in a large measure depends; that such fruit and the juices thereof have become and are generally used in great and rapidly increasing quantities, both voluntarily and upon advice of physicians, by people of all classes, ages and conditions; that it is necessary for the reasonable comfort, welfare and health of the people and in order to build up their strength and vigor that an adequate and dependable supply of high grade citrus fruit in the State of Florida is therefore hereby declared to be a business affecting the public health and interest, that unfair, unjust, destructive, demoralizing, and uneconomic trade practices have been and are continuing to be carried on in the sale and distribution of citrus fruit in this state to the extent that such fruit has been and is continuing to sell in many cases at prices below

the cost of production and the constant, dependable and adequate supply of such fruit for sale and consumption is thereby so seriously imperiled as to threaten the break down of the industry; that the present acute economic condition in Florida is in part the consequence of a severe and increasing disparity between the prices of citrus fruit and other commodities; that it is both expedient and necessary to build up the quality and reputation of Florida citrus fruit in the market and to stabilize the Florida Citrus industry and to protect the public and the growers against fraud, deception and financial loss through further continuation of unscrupulous practices and haphazard methods in connection with the marketing of citrus fruits, and to that end, to assure the grower returns at least equal to the cost of production of high grade citrus fruit.

Therefore, in the exercise of the police power of the State, for the purpose of protecting and promoting the public health and general welfare,

* * * * * * * *

Section 3. The Commissioner of Agriculture in his discretion and by and with the consent and advice of the Governor shall have the power to declare the existence of a State Emergency in the Citrus Industry, and upon petition or petitions signed by persons, firms, corporations, or associations, owning or controlling 50% or more of the producing acreage of citrus fruit, requesting such action, being filed with the Citrus Commission, such percentage to be based upon the survey heretofore made by the Federal Emergency Relief Administration and supplemented by such further surveys as the Citrus Commission from time to time may make, and after the Citrus Commission shall have procured from the producers, shippers or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form

annually the average reasonable cost per standard packed box of producing citrus fruit and every contract, agreement, plan or arrangement with the grower by or under which his citrus fruit shall be bought, marketed, or processed shall be held to require that the person, firm, corporation, or association buying, marketing or processing said citrus fruit shall in any event pay the grower said cost of production, to be ascertained by multiplying the said cost per standard packed box as shown by the record of the Commission current at the time the contract, agreement, plan of arrangement with the grower shall be made, by the number of packed boxes so bought, marketed and processed during the season or under the particular contract, agreement, plan or arrangement if for less than a marketing season. Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale, marketing and processing shall be valid and binding and the terms thereof shall measure the rights of the respective parties.

We are not concerned with sections one and two, but the provisions of Section three raise all the questions with which we are concerned.

Taking up these in the order of their importance, we consider whether it violates the due process clause of the Fourteenth Amendment. We are aware of the fact that many of the later decisions on the due process clause have gone far beyond the earlier ones.

The latest authoritative decision in which this question is discussed is *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 491, which says:

> "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not

recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguard is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the fourteenth amendment had been broadly described.

But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Chicago, B. & Q. R. Co.* v. *McGuire*, 210 U. S. 549, 567.

The definition of due process here given contains two positive requirements. First: the regulation must be as applied to the Citrus business, reasonable. To be reasonable, it must not be arbitrary, nor should it be unjust to any of those whom it undertakes to regulate. Second: It must have been adopted in the interests of the community. In other words, the community or the public must have an interest in or be concerned with such regulation.

The protection of the public should be the prime purpose of the regulation and not the business to be regulated.

Take the citrus industry as a whole and it is manifest that it is as much dependent on the canners as upon the growers, for we all know that the fruit in its natural state cannot be sto ed for future sale as grain is done, but that the juices when processed and canned can be. So if the crop is raised too large to be sold as gathered, the price of the fruit will be greatly reduced and the loss much greater than if the excess fruit is canned and the juices stored for future sale. The canner who processes the fruit and preserves the juice plays an important part in buying the excess fruit and processing it. The Act recognizes the canners in the reference to "the fruit and the juices thereof," and to processing the same.

The testimony showed that this year's crop is large, and the Citrus Commission fixed the cost to the grower of raising the crop of grapefruit at thirty-two cents a box, and that the canner could not pay that price and the cost of processing it and sell the juice without suffering a loss.

It further showed that the canners had established business of years standing with a large investment, employing several thousand employees.

That they had made contracts for sale of juice for future delivery and that they were forced to cancel when the cost price was fixed by the Commission.

The effect of this was that the canners were penalized for the benefit of the growers if the canners continued business.

The testimony also showed that many of the growers had organized cooperative corporations to process their grapefruit, the coope ative did not pay cash for their fruit to these growers, but credited them with the amount of the price of the fruit and were not expected to pay for it unless the market prices enabled them to pay it, and the Commissioner did not enforce payment while requiring payment of the regular canners.

This certainly was discrimination against the canners, and the Commissioner must have construed the Act so as to authorize him to do this.

The Act makes a sale for less than the price fixed unlawful. Suppose the price fixed by supply and demand is less than that fixed by the Commission, a sale by a grower for any less price would be unlawful.

If his actual cost of raising his crop were ten thousand dollars, he could not sell it for eight thousand dollars and so minimize his loss, but would be compelled to let it spoil on the trees and so lose the whole crop.

Is not this alone sufficient to make the Act arbitrary and prejudicial? We find the Act unconstitutional.

There is one other feature of the Act which may not render it violative of the Constitution, but certainly requires enjoining the Commissioner from enforcing the fixed price.

The Act provides that after the Citrus Commission shall have procured from shippers, producers or handlers of citrus fruit, not subject to the provisions of this Act, binding agreements to conform thereto and abide by its terms, the Florida Citrus Commission shall determine and record in permanent form annually the annual reasonable cost per standard box, of producing citrus fruit, etc.

There is no proof in the record of any such consent and agreement having been secured by the Commission.

We therefore conclude that the injunction should be granted.

LEON MCCORD,
U. S. Cir. Judge;

ROBERT T. ERVIN,
ALEXANDER AKERMAN,
Judge.

April 13, 1939.

Whereas, Honorable Nathan Mayo, Commissioner of Agriculture of the State of Florida, by and with the consent and advice of Honorable Fred P. Cone, Governor of the State of Florida, has by proclamation dated the 13th day of January, A. D. 1939, declared the existence of a State emergency in the citrus industry, under authority of Chapter 16862, Laws of Florida, Acts of 1935, known as the Grower's Cost Guarantee Law; and

Whereas, petitions signed by persons, firms, corporations and associations, which this Commission finds own or control 50% or more of the producing acreage of citrus fruit and 50% or more of the producing acreage of grapefruit in the State of Florida, have been presented requesting the Florida Citrus Commission to determine and record in permanent form the average reasonable cost per standard packed box of producing grapefruit; and

Whereas, the Florida Citrus Commission has determined that all citrus fruit dealers handling grapefruit now being grown in the State of Florida are subject to the provisions of said act; and

Whereas, the Florida Citrus Commission, based upon said proclamation of the Commissioner of Agriculture and the Governor of Florida, and upon said petitions, have proceeded as authorized and required by said Chapter 16862, Laws of Florida, Acts of 1935, hereby determines and records in permanent form the average reasonable cost per standard packed box of producing grapefruit to be thirty-two (32¢) for the entire citrus fruit season 1938-39;

Now, Therefore, the Florida Citrus Commission does hereby find, determine and order that the average reasonable cost per standard packed box of producing grapefruit is thirty-two (32¢) cents and that said price be recorded in permanent form for the season 1938-39 and that every contract, agreement, plan or arrangement with

the grower by or under which his grapefruit shall be bought, marketed or processed shall be held to require that the person, firm, corporation or association buying, marketing or processing said grapefruit shall in any event pay the grower said cost of production as herein ordered and as provided in Chapter 16862, Laws of Florida, Acts of 1935.

The foregoing resolution and order are unanimously adopted and promulgated by the Florida Citrus Commission in open meeting duly assembled in Lakeland, Florida, on this the 16th day of January, A. D. 1939, and shall become effective at 12:01 a. m. Friday, January 20th, A. D. 1939.

Florida Citrus Commission,
By John Maxcey,
Chairman

Attest: Chas. F. Chastain,
Secretary (Seal)

p. 3 of dissent.

SUPREME COURT OF THE UNITED STATES.

No. 270.—October Term, 1939.

Nathan Mayo, as Commissioner of Agriculture of the State of Florida, et al., Appellants,
vs.
Lakeland Highlands Canning Co., Inc., et al.

Appeal from the District Court of the United States for the Southern District of Florida.

[February 26, 1940.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellees, corporations of Florida and other states, and individuals, engaged in the canning of citrus fruits in that state, filed their bill in the District Court for Southern Florida against Nathan Mayo, as Commissioner of Agriculture of Florida, praying injunctions, temporary and final, to restrain him from cancelling their licenses as citrus fruit dealers, from enforcing against them a regulation made pursuant to a state statute, and from interfering with the conduct of their business by reason of their failure to comply with the statute.

On presentation of the bill and motion for temporary relief, the court issued a restraining order and convened a court of three judges. The Florida Citrus Commission was permitted to intervene as a defendant. After hearing on affidavits, filed by appellees and appellant Mayo, and, on evidence offered by the appellees, the court granted a temporary injunction pending final hearing.[1] The Commissioner and the intervenor have appealed.

The bill alleges the importance of the grapefruit canning industry in the State, and asserts that the appellees, in the conduct of their business, packed over sixty per cent. of the total grapefruit and grapefruit juice canned in the State in seasons prior to that of 1938-1939. It recites the adoption by the legislature of the

[1] 28 F. Supp. 44.

Growers' Cost Guarantee Act (Chap. 16862 of the Acts of 1935) which, after declaring that the production and distribution of citrus fruit is a paramount industry of the State, upon which the prosperity of the State largely depends, and assigning reasons for the protection of the industry and the maintenance of prices commensurate with the cost of production of citrus fruit, authorizes the Commissioner of Agriculture, in his discretion, with the consent and advice of the Governor, to declare the existence of an emergency in the industry; and provides that, if he does so, then,—upon petition of owners or controllers of fifty per cent. or more of the producing acreage of citrus fruit, and, upon procurement by the Florida Citrus Commission from producers, shippers, or handlers, not subject to the provisions of the act, of binding agreements to conform thereto and abide by its terms,—the Commission shall determine and record annually the average reasonable cost, per standard packed box, of producing citrus fruit. The statute provides that, thereupon, every contract with a grower for the purchase of fruit is to be held to require the purchaser to pay the grower a price per box equal to such ascertained and recorded cost; and continues: "Any contract, plan, scheme or device whereby it shall be attempted to preclude the grower from recovering such cost of production shall to that extent be held to be unlawful and against the public policy of this State, but in all other respects and particulars contracts of sale . . . shall be valid and binding and the terms thereof shall measure the rights of the respective parties." By its terms the act is to apply to any one or more of the varieties of citrus fruit.

The complaint further refers to the Bond and License Act (Chap. 16860, Laws of Florida, 1935, as amended by Chap. 17777, Acts of 1937), which requires every dealer (which term includes processors of citrus fruit) to take a license and provides that if the Commissioner determines that any dealer has violated the provisions of any applicable act he may suspend or revoke the license of the offender. Operation as a dealer without license is made a misdemeanor.

The bill alleges that the packing season for canning citrus products in Florida begins about November 1st of each year and continues until June or July of the following year; that preparations for canning include the ordering of cans, labels, contracting

for purchase of fruit, securing labor, planning of factory operations, and obtaining orders for the product.

It is alleged that, under the Growers' Cost Guarantee Act, the appellant Mayo, as Commissioner of Agriculture, with the consent and advice of the Governor, declared an emergency in the citrus industry on January 13, 1939, and that the Citrus Commission passed a resolution January 16, 1939, reciting that more than fifty per cent. of the owners or controllers of producing acreage of grapefruit in the State have requested the Commission to determine the cost of production of grapefruit, fixing the cost per standard packed box at thirty-two cents for the season 1938-1939, and decreeing that every contract with a grower shall be held to require that the purchaser shall, in any event, pay the grower the amount so fixed as the cost of production.

The bill states that the expected pack of grapefruit for the season 1938-39 was large, but that, due to the regulation, the output of the canned product has been less, by two million cases, than that of the previous season; that, since January 19, 1939, each of appellees has been offered quantities of grapefruit by Florida growers, at prices ranging from twelve cents per box for fruit to be processed into juice, to twenty-five cents per box for fruit to be canned into sections or hearts, and that, but for the regulation in question, each could, and would, have purchased such fruit, canned the same, and sold the canned product at a large profit; that, as a result of the regulation, much of the fruit remains unsold and is spoiling.

The bill further asserts that many growers own their own canning plants and may, therefore, process their fruit without being subject to the burden of the Cost Guarantee Law; and that many growers, with like immunity, process their fruit through cooperative organizations to which the Commissioner does not apply the cost price provisions of the law and regulations.

According to the bill a large proportion of the Florida canned fruit is sold in interstate and foreign commerce and much of it competes with that produced in other states which brings lower prices, and, consequently, the appellees cannot pay thirty-two cents per box and sell in competition with fruit elsewhere processed.

It is further averred that one of the appellees had made binding contracts of purchase prior to issue of the regulation, the obligation of which has been impaired thereby.

After alleging that each appellee has a large investment; that the payment of thirty-two cents per box would render it impossible for them to sell their processed grapefruit except at a loss; that the enforcement of the regulation will cause them large losses and irreparable damage; that if they do not comply with the regulation the Commissioner will revoke their licenses, and that, if he should do so, they will be compelled to suspend business or subject themselves to risk of fine and imprisonment under the Bond and License Act, the bill charges that the Growers' Cost Guarantee Law, as administered and as applied to them, is unconstitutional and void as illegally attempting to regulate interstate commerce, as violating the equal protection clause of the Fourteenth Amendment, because discriminating between cooperatives and the complainants, as taking their property without due process of law, and as impairing the obligation of contracts. The bill also challenges the regulation on the ground that the Commission failed to ascertain, in accordance with the law, that fifty per cent. of the owners or controllers of acreage had requested regulation and also failed to observe the condition precedent to making any order, namely, that all persons not subject to the provisions of the act should execute binding agreements to be governed thereby.

At the time of hearing and decree for preliminary injunction no answer or motion to dismiss had been filed. The court in its opinion stated that the defendants had appeared and, though they had not filed answers, argued the case "and requested the Court to pass on all questions presented, and especially on the constitutionality of the Act involved."

The court in its opinion, after a running commentary, concluded: "We find the Act unconstitutional." The court then went on to say that there was no proof before it that the Commission had procured agreements, as required by the act, from shippers or handlers not subject to the provisions of the act, and that, while this fact might not render the act violative of the Constitution, it required an injunction to restrain the Commission from enforcing the prices fixed. An injunction was issued to remain in force until final hearing.

We think the court committed serious error in thus dealing with the case upon motion for temporary injunction. The question before it was not whether the act was constitutional or unconstitu-

tional; was not whether the Commission had complied with the requirements of the act, if valid, but was whether the showing made raised serious questions, under the federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants.

The observations made in the course of the opinion are not, in any proper sense, findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.

It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure.[2]

The appellants complain that the court's opinion decides a question which was not open on the hearing and prejudices their position on final hearing; that the decision goes beyond the question of a prima facie showing made for the purpose of obtaining a temporary injunction and proceeds upon assumptions of fact not sustained by the evidence which appellants could have negatived by proof adduced at final hearing. The appellees insist that in holding the act unconstitutional the court did so only for the purposes of temporary relief and that its conclusion in this respect can have no effect upon the ultimate decision of the cause upon the merits. Nevertheless, the parties have essayed, in view of the action of the court below, to argue in this court the question of the constitutionality of the statute, whereas, if the court below had confined itself to the issue presented, namely, whether the proofs warranted the entry of an injunction pending a decision of the constitutional and other questions presented, the parties could either have obtained a trial on the merits long before an appeal from the interlocutory order could be heard in this case or, if an appeal from the interlocutory order had been perfected here, would have been restricted in argument to the question whether, upon proper findings and conclusions, the court had abused its discretion in granting or refusing an injunction.[3]

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[2] Compare Home Tel. & Tel. Co. *v.* Kuykendall, 265 U. S. 206; Railroad Commission *v.* Maxcy, 281 U. S. 82; Public Service Commission *v.* Wisconsin Tel. Co., 289 U. S. 67; Interstate Circuit *v.* United States, 304 U. S. 55; Borden's Farm Products Co. *v.* Baldwin, 293 U. S. 194; Polk Co. *v.* Glover, 305 U. S. 5.

[3] United States *v.* Corrick, 298 U. S. 435, 437.

Moreover, if appellants conceived themselves aggrieved by the action of the court upon motion for preliminary injunction, they were entitled to have explicit findings of fact upon which the conclusion of the court was based. Such findings are obviously necessary to the intelligent and orderly presentation and proper disposition of an appeal.

The appellants insist that the bill fails to state facts sufficient to raise a substantial question as to the constitutional validity of the statute. They could have made this point in the District Court by a motion to dismiss and obtained a prompt decision on it. They omitted so to do.

The record does not warrant a judgment of dismissal. The complaint raises constitutional questions of due process, equal protection, and violation of the obligation of contract. It further raises questions as to whether the act has ever been put into operation in accordance with its terms.

The appellees' principal attack upon the statute, based upon the Constitution, centers on its regulation of prices. The mere fact that the act fixes prices is, in itself, insufficient to invalidate it;[4] and allegation of that fact does not raise substantial federal questions. The presumption that an act fixing prices is constitutional would require the denial of a temporary injunction, except in extraordinary situations. Findings to support a conclusion against constitutionality would need to be unequivocal.

Some of the complainants are corporations of states other than Florida and allegations of the bill, which were not denied, sufficiently allege an amount in controversy in excess of $3,000 with respect to each complainant. In respect of the Commission's alleged failure to comply with the statute, it may be that these complainants are entitled to maintain the suit although not entitled to a hearing before a three judge court, even though it be found that there is no substance in the constitutional questions presented.

The legislation requiring the convening of a court of three judges in cases such as this was intended to insure that the enforcement of a challenged statute should not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable injury. Congress intended that, in this class of

[4] Nebbia v. New York, 291 U. S. 502; United States v. Rock Royal Cooperative, 307 U. S. 533, 569. Compare Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346.

suits, prompt hearing and decision shall be afforded the parties so that the states shall be put to the least possible inconvenience in the administration of their laws.

Both the court below and the appellants are in part responsible for the inexcusable delay in the disposition of this case. We are advised that since the entry of the injunction the defendants have answered the bill, and there appears to be no reason why the case cannot promptly be finally heard and decided upon the merits. We reverse the decree and remand the cause to the court below with instructions that, if the motion for interlocutory injunction is pressed, the parties, if they desire it, may be afforded a further hearing, and any action taken by the court shall be upon findings of fact and conclusions founded upon the evidence, in accordance with Rule 52(a) of the Rules of Civil Procedure.

So ordered.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 270.—October Term, 1939.

Nathan Mayo, as Commissioner of Agriculture of the State of Florida, et al., Appellants,
vs.
Lakeland Highlands Canning Co., Inc., the Polk Company and Roberts Bros., Inc., et al.

Appeal from the District Court of the United States for the Southern District of Florida.

[February 26, 1940.]

Opinion of Mr. Justice Frankfurter.

A different disposition of the case seems to me to be required.

Citrus fruit occupies a central and indeed pervasive rôle in the economy of Florida. That state's well-being is dependent on the cultivation of the citrus crop, its packing, transportation, financing and exportation. The appropriateness of regulations to be adopted for the citrus fruit industry is thus peculiarly a matter for the legislature of Florida in whose keeping is the shaping of that state's social and economic policy. In *Nebbia* v. *New York*, 291 U. S. 502, this Court recognized price control as one of the means open to a state for the protection of its welfare. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533. *Cf. West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. The allowable exercise of legislative discretion to attain price stability finds obvious occasion in the case of a commodity as basic to a state's economy as citrus fruit is to that of Florida. Certainly neither in the bill nor in the Court's opinion is a reason vouchsafed to take the present suit out of the scope of the *Nebbia* doctrine. The wisdom of such a policy—its efficacy to achieve the desired ends—is of course not our concern.

The price level here challenged was not hastily or crudely fixed. It was the result of an approved modern method for dealing with the complexities of such a problem. The price was not fixed directly by statute. It was ascertained under appropriate safeguards by a body established to carry into apt result the legislative policy for assuring "the grower returns at least equal to the cost of production. . . ." Laws of Florida, 1935, c. 16862. The Florida Citrus Commission on January 16, 1939, fixed minimum prices for

grapefruit, thereby establishing what is colloquially known as a "floor" for the market, so as to prevent the destructive play of blind economic forces.

This action was thereupon commenced in the District Court for the Southern District of Florida, not by any of the growers but by some canners, appellees here. On March 23, 1939, they sought to enjoin the Commissioner of Agriculture and other state officials from enforcing the fixed minimum prices. They claimed that these deprived them of the opportunity to buy in a cheaper market—the cheapness of competition indifferent to any but immediate consequences. They claimed irreparable damage and asked for both a temporary and a permanent injunction. On April 28, 1939, in the circumstances set forth in this Court's opinion, the District Court declared the statute unconstitutional and granted an interlocutory injunction. There were no findings—and there could have been none on this record—taking the statute out of the doctrine announced in the *Nebbia* case.[1] Certainly a consumer has no constitutional right to buy as cheaply as an unregulated industry would, under adverse circumstances, be compelled to sell.

Pursuant to the delays inevitable in a litigation like the present, an order allowing appeal was not granted until July 3, and the case was filed here on August 7, where in due course it was reached for argument on January 12, 1940. As a result, the injunction effectively suspended the operation of the Florida law during the whole marketing season, although this Court now finds that the injunction should never have been granted.

I do not believe we should now let this bill hang over next year's crop. We ought not to encourage the use of the judicial process for such unjustifiable attempts to set aside a state law by allowing them to be successful in result even though legally erroneous. We ought to apply what was characterized in *Mass. State Grange* v. *Benton*, 272 U. S. 525, 527, as "the important rule, which we desire to emphasize, that no injunction ought to issue against of-

[1] Appellees also attacked the Florida statute because of its provisions exempting co-operative and grower-owned canneries. This attack, however, must fail under our decision in United States v. Rock Royal Co-op., 307 U. S. 533. Appellees' contention that the statute is an unconstitutional burden on interstate commerce is likewise without substance. Sligh v. Kirkwood, 237 U. S. 52; Milk Board v. Eisenberg Co., 306 U. S. 346. Nor is there substantial basis for appellees' contention that the order unconstitutionally impairs the obligation of any contracts they may have previously made for the purchase of grapefruit at a price lower than that fixed under the statute. See, *e.g.* Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372. Cf. Knox v. Lee, 12 Wall. 457, 550-51.

ficers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury." Even if the present bill is taken at face value, it does not make out "a case reasonably free from doubt." The withdrawal of the ~~injunction pro-~~ ~~cess in~~ industrial controversies made by the Norris-LaGuardia Act was in no small part due to the belief by Congress that experience had shown that the use of a legal remedy devised for a simple situation might in a totally different environment become a perversion of that remedy. Congress has also given indication in § 266 of the Judicial Code (28 U. S. C. § 380) of its concern over the misuse of the injunction, fashioned for settling an ordinary clash of private interests, to restrain the machinery of a state in carrying out some vital state policy.

The supervisory power of this Court over the district courts becomes especially appropriate in equity suits. We ought to feel free to apply the traditional powers of the chancellor on appeal to act as though the suit were before him *de novo*. Compare *United States* v. *Rio Grande Irrigation*, 184 U. S. 416, 423. The present case demands that we enforce the "important rule" of *Mass. State Grange* v. *Benton*, *supra*.

Inasmuch as the Florida statute is obviously constitutional, the bill does not raise a substantial federal question and the District Court was without jurisdiction to entertain it on behalf of the appellees who are citizens of Florida. As to them, the case should be remanded to the District Court with directions to dismiss the bill.

Some of the appellees, however, are citizens of other states, and among the allegations of the bill, in addition to the amount of damage requisite to give diversity jurisdiction, are those of failure by the state officials to comply with some of the conditions which appellees assert to be indispensable for the issuance of a valid price-fixing order under the statute. ~~We express no opinion on~~ the merits of these contentions. In any event they do not touch the constitutionality of the statute or the order, and so § 266 of the Judicial Code cannot be invoked for their adjudication. As to these appellees, the judgment below should be vacated and the case remanded to the District Court for any proceedings that may be appropriate before a single judge. But compare *Gilchrist* v. *Interborough Co.*, 279 U. S. 159.

Mr. Justice BLACK and Mr. Justice DOUGLAS join in these views.